No. 2849

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH M. PRICE,

Appellant,

vs.

MARIE DEWEY WALLACE,

Appellee.

APPELLANT'S BRIEF.

Upon Appeal from the District Court of the United States for the District of Oregon.

WM. H. HALLAM,
Solicitor for Appellant,

AUTERSON-BRADLEY CO., PRINTERS, PORTLAND

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STATEMENT OF THE CASE.

I.

Peter B. Smith, of Minneapolis, died without issue, leaving the defendant, as his widow and sole devisee. With no child of the blood, he left two family branches by marriage. The later branch consisted of this defendant, childless and alone. The earlier branch consisted of the complainant and her two infant sons. The complainant was not Mr. Smith's natural daughter. She was the daughter of his wife. At the age of fourteen, she came to him with her mother, whose hand he had sought in marriage.

After living happily with Mr. Smith seven years, the devoted mother passed away. The complainant found

in Mr. Smith an indulgent father, and the memory of the mother, after her death, solemnized his thoughtful care of the child. The only child of his departed wife, she was the only child of his own, and nine years after the original taking, if we may permit Mr. Smith to speak for himself, he proclaimed her in solemn writing as *"my adopted daughter."* (Rec. pp. 585-586.)

To the same effect, five years later, is Smith's last parental letter—the last that can be found—written a *short time before* his sudden and untimely death. Will counsel frame a better parental model? (Rec. pp. 597-8.)

"March 1, 1907.

"My dear Bess: Your *good* letter *just* received. *Glad* to know that you are settled in your new home. . . . yes, I have not forgotten that Donald's birthday comes on the 8th of this month and I *want him to have something from me* on that day. I enclose a draft for $25.00, and think you had better spend about $5.00 for his birthday, and *you* can use the balance for something for the house. With *much love* to the boys, and kind regards to Ned, I am,

Yours lovingly, Dad."

It is claimed that at the time he wrote this letter Mr. Smith had *already disinherited this daughter and her children,*—had *already cast them off forever without a penny;* yet in that same thoughtful and solicitous manner he had been writing and remitting to the complainant

from year to year. His last letter before this one contained $100.00 and nearly every letter $100.00 (Rec. pp. 596 and 592-98). So while the complainant was not Mr. Smith's natural child, if we may employ the coinage of the Supreme Court of Minnesota, she was *"equitably equivalent"* thereto, and in his will her name does not appear.

A few months after Mrs. Smith's death, Smith quarreled with the father of these babes, turned him out of doors, financed his divorce, reclaimed the daughter, with her offspring, into his house and home, and *contracted with her that all he had would be hers "when he was gone."* The ejected husband is today a prominent surgeon at Carson City, Nevada, with a new wife and family. These helpless people have been defrauded in ghastly form. Smith's personal grievance caused that fateful separation, but he was not the man to slink, with craven heart, from all protection or insurance of the one child he had doubly appropriated and confessed.

Smith never forgot that he was of age when he ventured that interference, and more than that there is law, and to spare, that *forbids* him to forget.

May we first briefly indicate our position in point of fact and law?

This suit is brought to enforce a trust in two-thirds of Mr. Smith's estate, which trust the law constructs:

First. Upon the specific foundation of Smith's *agreement* with the *complainant, after* he *expelled* the *husband* and *father.* That agreement was modified when Smith engaged to marry the defendant, so as to embrace

only two-thirds of the estate, leaving the new wife her one-third.

Second. Upon the specific foundation of Smith's correlative *stipulation* with the *defendant,* shown to a moral certainty by several unassailed and accredited witnesses.

Third. Upon the broad foundation of an *equitable adoption,* which is *admitted without resistance,* in the defendant's oral examination, and *supersedes this species of will,* under the law of God and man, as that law is seen in every shining page of Holy Writ, and as that law is formulated in the Supreme Court of Minnesota and other jurisdictions.

Courts of equity do *not* decree the legal *status of adoption,* but they assert the power to adjudge, and they certainly *do* adjudge, the equitable "equivalent" of that status, in the matter of *property rights.*

Fourth. Upon the broad foundation of Smith's *total commitment.* If Smith turned his back in remorseless neglect, after dealing thus with a child, and her babes, equity in the very language of its powerful decisions, will *compel* him to *"stand upon and abide by the record he has made,"* and the measure of the child's right, if not specified in a contract, is a "child's share," or *even contrary* to the literal meaning of a contract, in the recent words of the Supreme Court of California, the child's right is measured by *"what would be the child's share under the laws of succession";* another entrance of the same doctrine of things "equitably equivalent."

The real essence of this fraud subsists in *conduct* and *not* in contract or specific performance of contract. The authorities soon reveal that fact, and they soon reveal the fact that the arm of equity is able to repel all such forms and intrusions of infamy.

The answer denies all *contract, stipulation, or parental conversation,* but it is impossible now to deny the documents that are unavoidable, and the enforced admissions that are conclusive. The decree refuses all relief.

This complainant *executed* unto Peter B. Smith one of the highest legal considerations rated in the judicial decisions. That consideration adhered not in naked promise, but in prolonged fulfillment. She gave a *life.* She gave three lives. For better, for worse, through fair days and foul, without original choice of hers, in all Smith's last fourteen years, she maintained the filial relation, and *while he lived,* Smith *never withheld* the compensatory protection which he had taught the young woman to expect; but from the moment and coincidence of his death, and throughout the complainant's long years of distress, not the feeblest parental token or remembrance has ever once escaped the clutch of this "good mother," and she says this was *Mr. Smith's will.* Here is her testimony:

> "He was *very fond* of the boys when they were *babies* . . . but as they grew *older* and he *saw them but twice,* he seemed to *drift away more from them,* and he spoke of them *less from year to year.*" (Rec. p. 454.)

But thereby the defendant dashed violently against

a contemporaneous monument. A letter of the *defendant's agent* shows Smith at dinner with the defendant, the very *last night before his sudden death,* drinking a *fond* and *proud* and *happy* toast to *these boys* (Rec. p. 600) and on this compulsion the defendant then and there actually *retracts* that gross family stigma, in words as follows:

> "Q. I am asking you, Mrs. Wallace, with reference to this time the night before he died, *was he very proud of the boys,* as Mrs. Smith says in this letter?
>
> A. *Yes, I think he was.*
>
> Q. And very *fond* of them?
>
> A. *Yes, very fond of them—they were handsome boys."* (Rec. pp. 457-8.)

Her unbridled *assertion* could leave Smith dereliction *possible,* but her *retraction* renders it *inconceivable.* The difference between her representation and her confession is all the difference between a decree for the *defendant* and a decree for the *complainant.*

Suppose we had not *possessed* this letter—what would have checked this merciless, soulless, encroachment upon a child? The *boldness* to *utter* such testimony shall not deter the boldness to *accuse* it. Perjury more rank and vile, cruel and defamatory, never stood confessed by a successful litigant, and *when we remember,* what the courts hold, as of course, that this suit attacks, *not* a *will,* but *only* this self same woman's *defiance,* of an alleged trust *under* a will, it would be putting a premium upon crime, to say that *any statement* of

that woman, on *that* day *is computable* above a cipher in opposition thereto. She is *caught* trying to cover one crime with another. The sworn theory and *foothold* of her defense, *destroyed* by this collision, the defense itself ignominiously falls, and the maternal *intent* to *devour* the SUBSTANCE OF the child is alternately perpetrated and confessed *from the witness stand.* Here is crime and confession of crime, perjury and confession of perjury, by the defendant in this case—not *suspected* and *doubtful* but *exposed* and *conceded.* This case smells to Heaven—It smells to Heaven, and the infamy is only begun.

The complainant is *interchangeably designated by Smith* in the *defendant's own solemn documents here,* as *"daughter,"* and *"my adopted daughter."* (Rec. pp. 609-585-6.)

That these terms *defined* the complainant's *status* in the *decedent's mind, to the hour of his death,* his letters plainly show, and the defendant, when directly questioned, *dare not* deny. "I never thought much about it," says the defendant. (Rec. p. 483.) Smith thought about it.

Cherishing the mother and children, then, until his death, with unstinted affection, according to the defendant's own written and oral concessions, what was Smith's parental conversation? *None,* says the defendant. None in all his last *four years. Her domestic falsities wax more and more abusive!*

She makes the following oath to the court:

"Q. Did you have any conversations with him

after *the complainant left Minneapolis* in 1903, in the interval between that time and his death in *1907*, concerning the care of the complainant and the children and their future prospects or property?

A. *No.*

Q. Money matters, in reference to them?

A. No, not that I ever remember.

Q. You don't remember any at all?

A. *No, indeed.*

* * * * *

Q. Did he ever mention to you his *ideas* concerning them and their *prospects* after he died, if he should die; when he died?

A. *Never, never, no.*

Q. He never discussed with you, property matters in these four years with relation to the complainant and the children?

A. Mr. Hallam, Mr. Smith was a very reticent man in regard to his business affairs." (Rec. p. 452.)

That fiction *exceeds* the *other*.

In the period in question Smith assisted the complainant in building a home in Mill Valley, California, and sent her cheerful remittances from month to month and year to year, as his letters show. Besides that he talked and wrote freely to outsiders.

"When they went away we spoke of them very often in a casual manner," says the defendant on oath to the court. (Rec. p. 451.)

> "The children are *very dear to me,* and it will make a *big void in my heart to have them go,"* wrote Smith just before that time. (Rec. p. 592.)

Save as she *confesses,* she *falsifies.* The conscience of equity equals the conscience of the law, and equity adapts the constructive and accurate logic of the statutes enacted for the benefit of pretermitted heirs. And accordingly equity does in fact both *presume* and *execute,* a disposing intent, in favor of an only child of long, practical, virtual adoption, not mentioned in the will. It is so held in equity *without dissent.*

That presumption the defendant does not extinguish. She fans it into a flame, and besides this dominating presumption that a father *will* provide, the actual family relation of these parties shown in Smith's unconcealable visits, letters, and remittances, suffice to convince the mind that he *did* so provide, beyond any doubt that can be called *reasonable. Fathers have in rare cases, suffered total and chronic degeneration, but never when they* HELD to such *constant* proofs of parental thought and protection. *Never.* Counsel have searched in vain for such a case. There *is* no such case. There can *be* no such case.

For love is the *anti-toxin of disinheritance. Estrangement and inattention* must precede the desertion of *an only daughter.* That *must be true,* and if that be *true,* nothing more is *needed* and nothing *less* will *do.* This case is not a *matter of conflicting evidence.* This case is a matter of applying full wrought *adjudications* to a defendant's *full-wrung confessions.*

To that human certainty we *add* the *letter* and *witness* of *friend* and *foe,* truthful people, whose character and veracity no one has yet *ventured to assail.*

The following is from a letter of one who wrote to the complainant, as a friend of the defendant, after Smith's death, and who testified for the defendant, as a witness of Smith's will:—

> "I understand she has acknowledged several times that Mr. Smith *intended some provision should be made* for them (the children), and *relied upon her* to carry out his wishes. . . . we should be *greatly disappointed* if she refused to do anything of this kind." (Rec. pp. 605-606.)

That letter furnishes the *clue of the case beyond doubt.* It was excluded by the court and we shall discuss its exclusion.

In an interview at the office of her attorneys the defendant said to Wilbur Hartzell, now a fruit grower at Medford, Oregon:—

> "Why, Mr. Hartzell, I think that is one of the finest thing P. B. ever did. *He left it all to my honor,* to take care of those boys, *and I propose to do it,* and see that they have good schooling. But I can't do anything for *Bess* now." (Rec. pp. 133-136.)

According to the defendant's dates, this was just after *Bess* had *sued* her. (Rec. pp. 439-40.) Confusion of funds in its most detestable form is not legally safe. *The perpetrator must prove her share or lose her all.* This is elementary law and honesty, and I shall

presently show how Wilbur Hartzell is by *all* concerned, accredited and verified.

About the same time she said to Mrs. Florence Hartzell:—

> " . . . that she understood what P. B. wished, and she *intended to carry out his wishes*, regarding the boys." (Rec. p. 154.)

On one occasion long after he married the defendant, Smith wrote to a relative concerning the boys as follows:—

> " . . . *if I prosper as I hope to, I shall at the proper time provide for their suitable education.*" (Rec. p. 592.)

The defendant says Smith was a man of his word.

The demon of fraud is in plain sight, and the burden of proof *shifts in law* to the *treacherous fiduciary* and *confuser* of *funds, to prove or lose her own share.*

Smith told Mrs. Hartzell:—" . . . that he would not have insisted on her getting a divorce from the doctor if he had not intended to provide for her and the boys." (Rec. p. 148.)

And he said to Mr. Hartzell of the boys:—

> "I expect to take care of them, feel toward them as though they were my own boys and shall *always provide for them.*" (Rec. pp. 139-140.)

And to W. T. Price, Sr., father of the complainant's second husband, from whom the complainant separated, Smith said at Mill Valley, California, in May, 1906, FOUR MONTHS AFTER HE MADE HIS

LAST WILL, as the two men of similar age chatted at Price's store:—

> "Mr. Smith said that he thought it just as well to leave money to the people he intended it for, in the hands of someone, a person that he was satisfied would use it in a proper way, and he said . . . *'Bess and the children are well provided'* . . . meaning the two boys that were playing around outside. . . . He said, 'I want to see that the boys have a good education and means to go into any business that seems best for them to when the time comes. If I live I shall see that it is done; and if not they are well provided for.'" (Rec. pp. 130-131.)

No one has ever yet had the courage to intimate that this defendant can be *exonerated, in equity, if Mr. Hartzell's testimony is true,* for, if so, our laws would be in league with malfeasance. She must tell what part of the fund is her own or lose it, of course. *The issue of veracity here is direct,* and any judicial review of the case should give *some idea what this pivotal testimony of Mr. Hartzell was,* and how he is to be *discredited,* and degraded,—surely by *something,*—a *little* something,—*more* than the *slow* and *evasive,* tottering denial of a woman who is caught, on oath, defaming and falsifying the heart and soul of her dead husband, and the children to whom she *ought* to be a mother! But as to all this the court is *silent. It is overlooked,*—Mr. and Mrs. Hartzell and Mr. Price, senior, are reputable people. *No one has, thus far, dared venture a word against their integrity and veracity.* In fact, defendant and her counsel

both are precluded, by their acts and good words, in this record (Rec. pp. 439-40, 140-44) from uttering against these people the slightest reproach. Their good name is a sacred right. It is as beautiful as perjury is hideous, and it is entitled to protection, in court, until it is forfeited by themselves. Their word imparts ~~variety~~ verity from the sources whereby it is shunned. They are the unattacked Rock of Gibralter in this case, these three people, W. J. Hartzell, Mrs. Hartzell and W. T. Price, Sr., They simply speak the truth. They reveal the very heart of truth as it is in God.

All that occurred before Smith's death, stands elucidated by these post mortem revelations. What is dark in Smith, this latest can illumine. What is low, it can raise and support, be it five, ten or fourteen years before he died.

Let us face the facts in this matter and this wicked woman will be *inexorably compelled* not only to *retract* the family *slanders,* but to *restore* the family *dues.*

Likewise, after he thrust out the complainant's first husband, Smith had promised the complainant that if she would stay and keep his home as his daughter while he lived *all he had would be hers when he was gone,* and she surely *did so keep his home,* the *pride* of the father, the *neighbors,* and the *servants,* a period of two years, literly from the hour of the mother's death to the hour when she was supplanted by this defendant. (Rec. pp. 563,67, 528-29, 548-51, 195-98.)

The morning after Smith's engagement to the defendant, he said to the complainant at breakfast while

tears stood in his eyes, as recited by the complainant, " . . . that this would make some difference to me. He said instead of you having everything I have when I am gone you will have one-third, and the boys will have one-third, and Dewey (the defendant) will have one-third, but," he said, "I think we will have enough for all." (Rec. pp.212-13.)

After he married the defendant, he discovered that his daughter was a *poor financier,* and he certainly found a good one. Men sometimes entrust funds to their wives; generally they are handled faithfully.

The defendant's report of Mr. Smith is legally and morally unaccountable, and in point of law, the written and oral declarations of the decedent, to say nothing of those of the defendant, in conflict with the will, would throw upon the defendant the burden of *subsequent explanation,* even as against a family relation *more remote* than that of parent and child. The defendant sees this and *attempts* an explanation, which ends in disaster and confusion, and thereupon she retires at last to her extreme default and subterfuge, *actually in these words*:—

> *"No, I cannot account for it." "It was as much a surprise to me as it was to anyone."* (Rec. p. 460.)

But when mighty wrongs seek perpetual shelter in equity, *surprise* will not stand lieu of *proof.*

In all cases, the shocking injustice of a supposed disposition, is, of itself, held to be far-reaching, independent factor of evidence and intendment against the projected wrong.

The magnitude of complainant's bulwark makes the defendant's masterpiece of confusion. The truth is, Smith *intended* to provide and he *did* provide. It is *presumed* that he did, and it is *clear* that he did. Smith said he did not want to continue *monthly allowances* for family support after the complainant married. No father does. He may have thought his obligation in that regard had ceased. But no father ever yet *disinherited* his only child and her offspring, *for all time* simply because she *married,* with his hearty approval. (Rec. p. 505.) No such case can be *cited.* No such case can *be.* No such idea is concrete in human affairs.

(1)

Upon all the facts before the court, a natural daughter, would recover her share *as of course,* and the complainant is her equitable equivalent. The fundamentals of the two cases are identical.

(2)

When the wolf has lingered long at the door of these tender wards, it is not *Smith* who willed their agony. It is the *substitute,* the hireling, who "fleeth, because he is an hireling, and careth not for the sheep." We scarcely need witness and incisive letter to put that truth beyond a peradventure.

(3)

Once the substance of the parental relation toward an only child is shown throughout a period of fourteen years, this defense is left without a mitigating trace,

without a gossamer shred of law or honesty. Courts of equity have not been accustomed to sit with complacent acquiescence, while such unblushing perfidy stalks in the streets.

(4)

The court below says the testimony must be "irrefragable." It *is* irrefragable, but from the latest decisions in Oregon and elsewhere, it is manifest reversible error to charge or demand that degree of proof in any civil case. The error is distinctly obvious.

(5)

The *truth* of this case, and the *righteousness* of this case are *not separated* by any mountain wall. Smith was a man of some weakness, some caliber, and some heart. He was a man his friends would gladly see again. And may we not as fairly cite a text itself, as its consequent array of fact and adjudication: —

"Whatsoever things are *true,* whatsoever things are *honest,* whatsoever things are *just,* whatsoever things are *pure,* whatsoever things are *lovely,* whatsoever things are of good *report;* if there be any virtue and if there be any praise, think on these things."

II.

The case covers a period of twenty-two years, but it seems competent to suggest within bounds, the main characteristics of its extraordinary history, its extraordinary defendant, and its extraordinary judicial decree.

The marriage of Mr. Smith and the complainant's mother occurred in 1893. Smith was then forty-three years of age, active in business, president of the Minneapolis Chamber of Commerce. From all accounts he was affectionate and generous. He never had a child of his own, and his abounding nature made no effort to conceal his joy that a child had come into his life.

The wedding trip comprised a visit to the World's Fair at Chicago. On the train, in the sunshine of that journey, the complainant called Mr. Smith, "Uncle Peter," as she had always done before. Smith drew her up into his arms and said, as the complainant testifies, "that I was to be his little girl and he was to be my father; that my name was to be Bessie Smith and not Bessie Ailes any more." (Rec. pp. 166-67, 170.) Our witness of this is Peter B. Smith. His corroboration is graphic. In the letter above quoted he *speaks* and *remits*, and *signs*, no whit less parentally and attractively than he talked in 1893. (Rec. p. 597.

Coming from antecedants of slender means financially, Smith elevated the complainant to the luxury of his station. She was always known by the name of Smith. Near neighbors, deposing now *for the defendant*, "never knew her other name." (Rec. p. 548.) She retains a memorial of her French instructress inscribed to "Mlle. Elizabeth Smith." (Rec. pp. 172-73.) In the name of Smith she was known in school and college. Among the charter members of the fashionable Minnekada Club at Lake Calhoun, appear Mr. and Mrs. Peter B. Smith and Miss Elizabeth Smith. (Rec. pp. 175-76.) That keen delight found in watching the development of a

child, took natural possession of the new father. He always introduced the complainant as his daughter, and as "daughter," or "adopted daughter," she was always designated by him in his communication written and oral. (Rec. pp. 483, 564-65-66.)

Save temporary absences, the complainant lived at home from 1893, to her marriage in 1899. Her own father was not dead, but divorced. Very little is heard of him until 1899, when he had business at London, England, and requested that the complainant be allowed to take the trip with him. After some hesitation Mr. and Mrs. Smith granted the request. Upon that occasion, the two were Mr. Ailes and Miss Ailes, instead of Mr. Ailes and Miss Smith. On shipboard the complainant met Dr. MacLean, a young army surgeon, and the meeting ripened into a prompt engagement of marriage. This betrothal of a woman while on a sojourn, rankled in Smith's bosom so long, that three years later, he became an accessory to the like misdeed. (Rec. p. 405.) Smith was not a Pharisee. The junior offense was promptly condoned by the senior offender.

The consent of the parents was obtained by mail; the marriage occurred in London soon afterwards, and was confirmed by the parents at the first opportunity. Mrs. Smith met the young couple at Savannah, Georgia, and in June following they were cordially entertained by Mr. and Mrs. Smith, in a round of social functions, for two weeks *in Minneapolis.* A little later that year, the complainant made her parents *another* visit *at Minneapolis,* by reason of the illness of her mother, (Rec. p. 29.) and *on the heels of that call,* Mr. and Mrs. Smith,

in turn, spent *several months* with the young people at *Honolulu,* the following winter of 1899 and 1900, where Dr. MacLean, as army surgeon, was then stationed, and the complainant was expecting to give birth to a child. The child Donald was born March 8, 1900. It was the first childbirth in Mr. Smith's family experience, and a few days after the anxiety of that ordeal was over, the elder couple returned to Minneapolis. (Rec. pp. 182-83-84-85.)

Mrs. Smith's illness grew worse, and in a race against time, MacLean and wife and babe reached Minneapolis in June, 1900, a few hours before Mrs. Smith's death. (Rec. p. 187.)

Thus the family contact was as steady and admirable as any could very well be. But *no meeting, no communication,* of parent and child does the court notice in his history of those sixteen months, dating from the complainant's marriage to "the death of her mother."

Here is the court's recital:—

> "She returned with her husband soon to the United States, and accompanied him as he was transferred from post to post, but later returned with him to the home of Smith in Minneapolis. . . . The immediate cause, however, of their coming to Minneapolis, was the illness of the plaintiff's mother. . . . After the death of her mother, which occurred on June 12th, 1900, the day of her arrival in Minneapolis, it was arranged that plaintiff and her husband should live with Smith, etc." (Rec. p. 100.)

That itinerary errs not in one thing, but in *all material things!*

There is only one relevant purpose of this history, and all that is *relevant* has been judicially *overlooked.* The relevant purpose is to present these parties in their true relation. That function is not only important, but *conclusive;* for that relation once displayed in its parental character, from beginning to end, the idea of brutal abandonment, involves a contradiction that *can not be intelligibly received.*

Such erroneous schedules as those of the opinion would cause train dispatchers to send thousands to their eternity. It is *grievous* error to consider this complainant as moving from military "post to post," at a time, when in fact, Mr. Smith stood at her bedside in Honolulu, with an eager parental yearning, which no one is at liberty to disparage, while she struggled through the consummate peril of childbirth.

Smith forget that? It is forgotten in equity, but read Smith's memorial of that Honolulu baby, seven years later, in his last splendid parental letter to the complainant, as well as his previous letters, all found in the record (Rec. pp. 592-98), but unnoticed in the opinion, and need anyone add that the decree of the court is totally misconceived, and sheds no light upon this trial de novo?

This complete judicial oversight of all family communication, unrelieved as it is, in the opinion, by the handy correctives of later years, such as Smith's perennial letters, could easily lead to an impression of family

estrangement, where in fact, the family love was *perfect* and *perfectly commendable.*

And this unrelieved judicial oversight, would also tend toward a decree for the defendant, while the stubborn facts, as they *are,* can, in *all reasonable judgment,* admit none but a conclusion for the complainant.

Did Smith travel from Minneapolis to Honolulu to give his daughter in childbirth a serpent? And is the trail of the serpent discernible in those last warm lingering *words* of love, from Smith's *pen,* in 1907, any more than in those *acts,* that speak *louder* than words, at Honolulu in 1899-1900?

Let us face the physical facts as they are, and this wicked woman will be inexorably compelled, *not only* to *retract* the family *perjuries,* but to *restore* the family *dues.*

Throughout the equity decisions, the relation of the parties, is the rod that swallows up all the other rods. For in the first place, the parental relation proves the *contract,* in a case like this. It *directly* proves the *substance* and *body* of the contract,—the *execution.* Very little more proof of a contract is needed, in cases of this nature, even as between adults and non-relatives. (129 U. S. 238, 242-43) ; simply another entrance of the same identical doctrine of things *"equitably equivalent."*

In the second place, the parental relation is sufficient *without* a contract, as against a will that does not name the child.

III.

Literally from the hour of her mother's death, Smith

honored the complainant with her mother's *place,* as the *head of his house,* and that place she filled the next two years, and until the defendant arrived. Dr. MacLean had resigned his position partly because he could not get leave of absence, and Mr. Smith set him up in private practice in Minneapolis. But he offended Mr. Smith and Smith told the *defendant's witness Lauderdale* that he said to MacLean:—

> "Donald, . . . *you* have got to leave this house. I will buy you a railroad ticket to any place you want to go, it doesn't make any difference where it is." (Rec. p. 521.)

MacLean had to go and go he did. But what of his wife and child?

The court's version of those facts is this:—

> " . . . trouble arose which resulted in Dr. MacLean's leaving. . . . Plaintiff asserts that her stepfather would not allow her with her child to go with her husband," but that the defendant's own deponent asserts the complainant's absolute *verification,* the court does not observe. (Rec. p. 101.)

The defendant admits that the complainant was an attractive girl in Smith's estimation. (Rec. p. 469.) In the ensuing two years she was the pride of her adoptive father and the admiration of the neighbors. *Three Minneapolis witnesses, in their depositions for the defendant, make vital admissions. They are Mr. and Mrs. Lauderdale across the street, and Emily Carlson, the household servant.*

Mrs. Lauderdale's attention was called to the end

of this two-year period, the winter of 1901-2. and speaking of that winter she testifies:—

> "Mr. Smith was at our house a good deal, because he and Mr. Lauderdale played cards together. He would come up,—he was at our house a great deal, perhaps *three or four times a week*, and in the meantime *we would go down and see Bess and the children.*" (Rec. p. 550.)

Mrs. Lauderdale's fondness for Bess was not from dearth of amiable neighbors. Such people as Sol Smith Russell and Judge R. D. Russell, with charming families, lived within a stone's throw.

"I never knew her other name," says Mrs. Lauderdale. (Rec. p. 548.)

Again more particularly as to the earlier years Mrs. Lauderdale testifies:— (Rec. pp. 548-49.)

> "Q. His conduct and manner towards her was just like that which you would naturally expect of an own father, was it?
>
> A. Yes.
>
> Q. But as to her manner and conduct toward him?
>
> A. *It was just as nice as his was toward her.*"

Mr. Lauderdale testifies: (Rec. pp. 528-29.)

> "Q. You had, however, been in the habit of visiting Mr. Smith's home during the *nearly two years* after the death of Bessie's mother, and during which time *Bessie was acting as his housekeeper?*
>
> A. Yes, sir.

Q. *And during all of that* time Mr. Smith had *never* made any complaint to you about Bessie's conduct or anything about it?

A. *No.*

Q. On the contrary *during all of that time* he seemed to be fond of her, wasn't he?

A. *He always was.*

Q. He treated her really as he would treat his *own daughter?*

A. *Yes, sir.*

Q. And was fond of her children?

A. *Yes, exceptionally so.*

Q. And it was only after his *marriage* to his *new wife* that this old matter of *two* or *three years before* was raked up and made the subject of special conversation with you?

A. (*No answer.*)

It is stipulated and agreed by and between the parties hereto that the reading and signing, etc.."

No one can wonder that Lauderdale shunned the true answer. That "old matter" was a financial difficulty, imputed by Smith to Dr. MacLean, wherein the complainant's unselfishness, as we shall presently see, was some hundred times more conspicuous than ever the defendant's.

Emily Carlson says:—

"He loved her children." (Rec. p. 565.)

She was "* * * *fond of him and attentive to him.*" (Rec. p. 565.)

These are not our witnesses. These are the *defendant's witnesses.* In those two years and former years the deep roots of this case are found, but *all this is unnoticed* in the opinion of the court.

IV.

The court finds that after Mrs. Smith died, "it was arranged," that the complainant was to keep Mr. Smith's house, and MacLean was to practice medicine in Minneapolis. MacLean's departure of course upset that arrangement.

Parent and child are now alone about two years. What did *they* arrange in all that time? The court finds *nothing.* The defendant is *non-committal.* She offers no report or tradition from the lips of Mr. Smith, different from that of the complainant. She makes a troubled effort to show that Smith was a very silent man! But he talked to *others,* and he used his *pen.*

The defendant's denial of her husband's parental *conversation,* is precisely the same strain upon our credulity as her ill-fated denial of his parental *affection;* and her ill-fated denial of the *Hartzell conversations;* her ill-fated denial of her *own mother's sure proof* that Smith's will, number one, was not drawn between the wedding ceremony and the departure of the train (Rec. p. 461-62, 608); her ill-fated denial that any fault of hers waited four days, and until the eve of the funeral, before wiring the complainant in California of her father's death (Rec. pp. 446-450-455); and other astounding denials that we shall presently notice. *Precisely* the *same strain.*

The *same flat;* the *same contriver; all one atrocity.* There was *some* arrangement and whether it was Smith, at some time, told his wife. She says he was honorable. If his story to the defendant in any way differed from that of the complainant, let her tell the court what it was.

Some arrangement was surely made. Seven years before, in the hour of joy, Smith had told the complainant as a child that she was *his. Far more important,* in the seven years that followed he had told her the same thing, *by his every act.* And now when they were partners upon the rebound of a double sorrow, he urged her to renounce her husband, and keep his home and cherish him as his daughter while he lived, with the promise that all he had should be hers "when he was gone." (Rec. pp. 195-98.)

If Smith ever told the defendant of any other different arrangement, let her tell the court.

Smith's family love was at *that time* undivided. What the complainant says he then *agreed,* is what we *know* he must have then *intended.* And if his intent and agreement *concurred,* he could not *change* his mind and withhold from the young woman the promised consideration for a stranger, *even if his blood had* become sufficiently cold. He could not *put* two babes out at *sea,* take care of them *awhile* and leave them to their fate for the *lure* of a *childless wife.*

This defendant, a later arrival, was alone with Smith throughout his last *four years,* and she *offers no recital or tradition* from his lips of any *different* arrangement with the complainant than that which the *complainant asserts.*

She would have us believe the intense scenes of those two years were enacted by man and child in pantomime.

> "Q. * * * her position in the household was practically the same as her *mother's* position before her death, as the head of his *house,* is that right.
>
> *"That was what Mr. Smith told me,"* says *Emily Carlson.* (Rec. pp. 564-65.)

He talked to his *daughter* before he talked to his *servant,* and the *contract was commensurate with the performance.* It involved the *life* and *status* of *four people* at least.

For a long while the complainant refused to give up her husband. She was pregnant and wanted to go to her husband for the birth of their second child. But as the time of her deliverance drew near, MacLean was able to show no signs of a home, Smith kept insisting, and finally in April or May, 1901, she consented to the arrangement and a divorce. The child was born in July and the divorce was begun in September, after convalescence. The court comments on the delay, without considering the pregnancy and the childbirth. (Rec. p. 106.)

As Smith traveled to the Hawaiian Islands at the birth of his daughter's first boy, the second boy was *born under his roof.* Smith named him Robert, because his pet name for the mother was "Bob" or "Bobbit." (Rec. pp. 172, 200.)

Such was Smith's confirmation of his seven years' experience as the complainant's father, and such would

have been the complainant's position to the end of Smith's days, but for fresh events over which she had no control.

V.

All was now tranquil in the Smith home. No forecast now of tears and suffering. But it was the calm before a storm. Forked lightning soon loomed madly in the Western sky. One morning early in 1902 Smith telephoned his daughter that he had an old friend in town, and requested the complainant to come and meet her at lunch. (Rec. p. 203.)

That friend was the defendant. She was at that time a widow without estate or offspring, residing with her mother at Fargo, North Dakota. She was accompanied on this visit to Minneapolis by her brother. Events moved rapidly. Visiting with Mr. Smith *in his house* in Minneapolis one spring evening in 1902, when the *other inmates* of his house were *absent,* according to her own account, the *defendant* consented to become the wife of *Mr. Smith.* (Rec. p. 405.)

Four years later this brilliant and *captivating* woman appeared in Probate Court as his executrix and sole devisee. But like *all* world conquerors she *failed* to make that world conquest, empty handed, without *shifting conditions* of fact and *steady conditions of law.*

The wedding soon followed the engagement. It occurred at Fargo May 16, 1902. Fargo had its uses. The complainant was present at the wedding. She had been present at various functions kindly given by herself in the defendant's honor at her Minneapolis home, but

these courtesies were not returned when business as well as festivity was to occur at Fargo.

On the wedding day Smith made his will, *with the aid of a Fargo attorney.* (Rec. p. 461.) The defendant received a copy; but the complainant received no copy, and that will was *profoundly concealed* from Mr. Smith's *daughter* until *long after the defendant made her answer in this case now at bar.* (Rec. pp. 212-15.)

Why the darkness? In that will Smith twice calls the complainant *"my adopted daughter,"* bequeaths her $5000.00, and her *children* $5000.00, and makes her one of the *trustees* for the children *without bond.* Why was the will a muniment of title unto the wife and a fugitive from the daughter? Why was Smith ashamed of it?

The *defendant* will not *tell,* and she may not *complain* when those tell who *will.* She denies that she ever *heard* of the Fargo will until *after* the wedding, and she heard of it, then from *someone else before* she heard of it from *Smith.* (Rec. p. 461.)

Stoutly, but nervously, she denies on the witness stand that *her mother,* could possibly have known of this will until after the wedding, but lo and behold, she had *not been informed* that her mother's *testimony then and there resting* in the *files,* exhibits Smith *defending the inequalities* of this will to *her before* the wedding." (Rec. pp. 608-9.)

What says the complainant? She says the $10,000 was decidedly *less* than Smith had theretofore *promised her,* the morning after the defendant engaged his hand. He told the complainant of the engagement. He said

no one could ever be like the complainant's mother to him. And he said:—

> "Instead of you having everything I have when I am gone you will have one-third, and the boys will have one-third, and Dewey (the defendant) will have one-third." (Rec. pp.212-13.)

Defendant says Smith was worth $40,000.00 at that time. (Rec. p. 470.) We think much more. If the complainant had possessed no claim on Smith, he would have been as proud to tell her of the windfall of $10,000.00 as he was to assure the complainant the rest. There were attorneys in Minneapolis quite competent to draw Smith's will.

VI.

The complainant became a subordinate member of the household. Smith loved the complainant and "he loved her children." The defendant did not care for the children, (Rec. p. 570), and she did not "like" the complainant. "She did not like her I know that," says Emily Carlson. (Rec. p. 569.)

"Did the complainant like the defendant?"—counsel asked Emily, and this was her response:—

> *"She didn't feel at home* after *she came there."* (Rec. p. 569.)

Tolerated coldly, where she had lately ruled, she did not feel at home; the torment of homesickness without the relieving hope, that some day she would see the home again. For the fair promise of that hope she had *reluctantly severed* the dearest earthly ties. This high

conflux of events is worthy of notice in a judicial opinion which purports to delineate these family relations; for love is the anti-toxin of disinheritance. Smith's system was too strong to admit that last stage of disease, even in the compulsion and excitement at Fargo.

Smith could not *see* half as straight as Emily Carlson. *He* thought his home was his daughter's home, and complainant begged him in vain for a humble separate maintenance. (Rec. p. 218.) He had taught her no occupation. One day she went to his office and told him she could bear it no longer. There was one thing she could do. She would go on the stage. He objected; did not think her competent, but finally sent her each week she was on the stage the same amount as her salary. The children stayed at home in care of the nurse.

The complainant remained on the stage one season, and then took her children and made a little home for herself and them at Mill Valley, California. There Smith supported her. There she resided from 1903 to 1908. There, with Smith's hearty written consent, in 1905 she married Edward J. Price, (Rec. p. 595), who died without estate in 1914. There Smith made his little colony two visits that suffuse the human heart with joy. There he told W. T. Price, Sr., one of nature's noblemen, at Price's store in May, 1906, after he made his latest will:—

> "Bess and the children *are* well provided. * * * I want to see that the boys have a good education, and means to go into any business that seems best for them to, when the time comes. If I live I

shall see that it is done, and if not they are well provided for." (Rec. pp. 130-31.)

The defendant says this disinheritance is a *mystery.* We say it is *plain.* We say it is not the mysterious duplicity of him who *loved,* but the later duplicity of her who *coveted. There can be no fact more certain. No doubt* Smith *mentioned* the care of his family, *in some way,* in those four last years when he and the defendant were alone in Minneapolis. No one can doubt it, but the defendant says "No." *"Never, never, no."*

VII.

Smith made his last will in January, 1906. Attempting to walk up Mount Washington, New Hampshire, with his wife, he died at the half-way house August 16, 1907. The defendant buried him in Minneapolis *five days later,* and *concealed his death* from his daughter in California until the *day of his burial.* (Rec. pp. 225-26, 449-455.)

Crowded for a *reason,* on the witness stand, she and her confederate gave *flatly opposite excuses;* but *just after the event,* when they were *not* crowded, they sent the complainant a letter which *attempted no excuse at all,* for this disgraceful neglect. (Rec. pp. 599, 455-57.)

As soon as she heard of Smith's death the complainant and her husband *hastened to Minneapolis.* They were guests of the defendant a week or two at the *old home,* and *there in answer to the complainant's inquiry,* the defendant in her soft, ingratiating manner, told the complainant, *"she knew the agreement,"* the agreement

of Smith and the complainant, as the complainant took her to mean, and would *probate* the *estate* and *send* the *complainant* her *share* in *California, where she advised her again to go.* (Rec. pp. 230-31.)

No doubt Smith told the defendant more than once in those last four years when they two were alone, that he wished to carry out his agreement with Bess, and no doubt in order to get the last will as it was, the defendant pledged two-thirds as easily as two cents.

The complainant *returned* to *California,* but she waited and heard nothing from the defendant. She wrote her repeatedly in vain, and finally, convinced of the defendant's treachery, she made a *second* pilgrimage to *Minneapolis,* the next year, and *sued* the *defendant* upon her *claim.*

A demurrer to her complaint was sustained, but *whether* upon the *merits* or upon some of the *three* specified grounds in *abatement,* does not appear. (Rec. pp. 69, 70, 71, 90.) It was a case of *uncertainty,* and *no bar.* It was an uncertainty upon which the *court below* did not *stand* and rely. *No final judgment was ever entered* in that suit, (Rec. pp. 70, 71, 90), and no ground of general demurrer is *imaginable* in Minnesota where such claims have *repeatedly* prevailed upon *like pleading.* (Cases cited below) An appeal was begun and dismissed. It is clear the complainant never had her day in court, upon the merits, but this is set up here as a defense.

The *defendant removed to Oregon* soon after that proceeding, the complainant remaining in Minneapolis

until 1914. Needless to recount the years of poverty and distress. Complainant has never had the sinews of war. She has found the utmost difficulty in providing the expense of this suit.

But against all odds she has brought up the boys, two fine young fellows, well abreast of their school work, lately finishing the grades. Shortly after the present suit was begun she joined her old father Ailes at his request on a ranch in Washington. There as the sole female inhabitant of his cabin she had the new experience of braving the hardships of pioneer life. Ailes finally lost possession of the land and the complainant then returned to Mill Valley on San Francisco Bay, where some of the quieter years of her life had been spent.

ASSIGNMENT OF ERRORS.

Complainant assigns the following errors, to-wit:

I.

The court erred in its judgment and decree wherein and whereby the court ordered adjudged and decreed that the bill of complainant herein be dismissed.

II.

The court erred in denying the complainant the relief for which she prayed in her bill of complaint.

III.

The court erred in rejecting the complainant's offer in evidence of the certain letter of C. A. Brown to the

complainant, marked as Complainant's Exhibit "F", which letter is in words and terms as follows:

Minneapolis, Minn.,
June 26, 1909.

Mrs. Elizabeth S. Price,
1200 Second Avenue South,
City.

Dear Madam:

Mr. Dunwoody has turned over to me your letter to him of June 24th for the reason that this being his last day in Minneapolis his time is exceedingly crowded and he cannot find the opportunity to reply in person. He has, however, talked with me quite fully concerning the contents of your letter and has outlined his ideas in regard to your affairs, so that I feel warranted in saying that this letter expresses his sentiments as fully as my own.

I have not seen Mr. Hartzell since his return, but am not surprised at the position he takes in regard to the uselessness of conferring with your attorneys. Our position in regard to that is precisely the same. We would have no confidence whatever in any predictions made in regard to the outcome of the case by an attorney who will take a case on a contingent fee, and we can see no object in talking with them about the matter, because we feel absolutely certain that Mrs. Smith can neither be cajoled or threatened into making any settlement of this suit. We feel certain that by your course in trying to break the will of Mr. Smith you have put yourself beyond the pale of her sympathies, and that the only hope of ac-

complishing anything in an appeal to her lies in reaching her sense of justice concerning the education and maintenance of your boys, in regard to which I understand she has acknowledged several times that Mr. Smith intended some provisions should be made for them and relied upon her to carry out his wishes. We believe her position is that your course has made it impossible for her thus far to do anything along this line and that nothing of this kind could be done until this lawsuit was finally disposed of. In any event we do not anticipate that she would be willing to pay over a lump sum of money to be handled by you or your attorneys.

We should suppose that if she can be persuaded to do anything it would be something along the line of placing your boys in a good school where they would be well taken care of and where the necessity of their education, which is becoming urgent, would be fully met. Of course we have no means of knowing whether she would even do this, but we should be greatly disappointed if she refused to do anything of this kind. It would not be surprising, however, if she made it a condition that these legal proceedings should be discontinued before undertaking the education of your boys.

It is our opinion that if such an arrangement could be brought about it would be altogether the best thing possible for the future of your sons, and that, of course, is dearer to you as a mother than anything else on earth. Furthermore, it would leave you unhampered to earn your own living, which you have thus far not been able to do, presumably because you were so tied down by the care of your children that you could not give

up your entire time to any employment. We can conceive of no other reason why a woman in the prime of life and in reasonably good health and with the advantage of an appeal to the sympathies of people, and with friends to speak a good word for her, could not within a reasonable length of time secure employment, by means of which she could, with strict economy, maintain herself in a fair degree of comfort. Innumerable women have to do this, and do it successfully even when they have no friends to fall back upon in case of emergency, as you have thus far had.

Your truly,

C. A. Brown.

IV.

The court erred in rejecting the complainant's offer in evidence of the authenticated copy of the inventory of the estate of Peter B. Smith, verified by the defendant herein, which inventory was so offered by the complainant as complainant's Exhibit "G," and marked and designated as such.

ARGUMENT.

C. A. Brown, of Minneapolis, gave a deposition for the defendant, as a witness of Smith's will. About a year after Smith's death, Mr. Brown as the defendant's apologist, and apparently in the defendant's behalf, wrote the complainant a heartless letter, such as *Smith never* wrote, in which, however, he admitted as follows:—

> "I understand she has acknowledged several times that Mr. Smith *intended some provision*

> *should be made* for them (the children,) and *relied upon her* to carry out his wishes * * * we should be *greatly disappointed* if she refused to do anything of this kind." (Rec. pp. 604-7.)

All can see that C. A. Brown in 1909 was not dispensing fiction for this complainant. His letter was excluded, but on every principle which admitted the letter of Ed. J. Price to Jessie Carey Smith, (Rec. pp. 417-19, 604), and perhaps on the authority of Burns v. Smith 21 Mont. 251, 75; 53 Pac. 742, 48, it was res gestae. It was res gestae partly because it is a contemporaneous writing which furnishes to a moral certainty the clue of this case. But exclude it for a moment if you will.

Wilbur Hartzell, now a fruit-grower of Medford, Oregon, and for twenty-seven years prominent in the Van Dusen-Harrington Company of Minneapolis, testified at the trial, that the defendant said to him, when he expressed surprise at the will:—

> "Why, Mr. Hartzell, I think that is one of the finest things P. B. ever did. *He left it all to my honor,* to take care of those boys, *and I propose to do it,* and see that they have good schooling. But I can't do anything for Bess now." (Rec. p. 136.)

Just after Bess had sued her, according to defendant's dates. (Rec. pp. 439-40.)

Mrs. Hartzell, a cousin of the complainant, testified at the trial that soon after Mr. Smith's death the defendant said to her:—

> "* * * that she understood what P. B.

wished, and she *intended to carry out his wishes,* regarding the boys." (Rec. p. 154.)

What has the defendant to say for herself? She sits on the witness stand and after much sparring and delay finally repudiates these conversations, in succession. These witnesses have delivered malicious inventions of perjury if the defendant's denials are true, and no one has ever charged this infamy.

The truth of this matter is easily apparent from the defendant's total plan and scope. She denies these conversations with the witnesses, and she denies the remotest conversation with her husband on the subject to which those conversations with the witnesses relate. She sweeps away their whole foundation. She never even heard of any will, in Smith's lifetime, save the Fargo will. She learned of the later will, never from Smith himself, but from others after Smith died.

Not a suggestion in regard to Bess and the boys, did Smith utter to her, touching their care and welfare, from 1903, when they left the old home, to 1907, when he died.

"*Mention of money matter,* in reference to them.

A. *No, indeed.*

Q. Ever mention to you his *ideas* concerning them and their prospects after he died?

A. *Never, never, no.*" (Rec. p. 452.)

All *admit* that in the period in question, Smith assisted the complainant in building a home in Mill Valley, and sent her cheerful remittances from month to month

and year to year. His letters show this. But not a word did he speak. He talked and wrote to outsiders, but never a word to his wife. She says he was the soul of honor. Never a word in his last four years about the care and fate of the only child he ever called his own; the child interchangeably designated by himself in the defendant's own documents here, as "daughter," and "my adopted daughter."

The defendant has already testified that she supposed the Fargo will stood in force until after Smith died, and knowing that in this will he repeatedly called the complainant, "my adopted daughter," and made her a trustee of $5000.00 without bond, the defendant dare not deny, and does not deny, what the whole case shows to be true, that the term, "adopted daughter" defined the complainant's status in the decedent's mind to the hour of his death.

Not a word from Smith for the good of his only daughter; nor for the good of her babies whom he had rendered fatherless; never a word for weal or woe of the tender family whom he told the defendant's witness Lauderdale just how he had beheaded and seized.

But her defiance of these four witnesses is only begun.

> "When they went away we spoke of them very often in a *casual manner,*" says the defendant, on her oath, to the trial court. (Rec. p. 451.)

> "The children are *very dear to me,* and it will make a *big void in my heart* to have them go," wrote Smith in a letter *just before that time.* (Rec. p. 592.)

The defendant knows as everyone knows that *love* is the *secret* of *parental dispositions,* and that *loss* of love must *precede disownment* and *disinheritance.* As for *herself* the defendant says, *she* "always had a tender feeling toward the boys," which remained unabated until after Smith died. (Rec. p. 438.) But with *Smith* it was *different.* "He was very fond of the boys when they were *babies,* but as they grew *older,* and he saw them but *twice,* he seemed to drift away more from them, and he spoke less of them from year to year." (Rec. p. 454.)

As to when he last ever so much as mentioned them at all, she says:—

> "I think it was probably after our last visit to see them after the earthquake." (Rec. p. 454.)

The earthquake was in April, 1906, and Smith lived until August, 1907; a year and four months. These are sad revelations. So far forgot his family that they were no longer a tradition at his fireside. It is pitiful in court to see a woman compelled on oath to class her dead husband and benefactor as a man, unstable as water, as heartless as a snake, and as cruel as the grave; and thereupon a providential *letter* of the defendant's *own agent Jessie Carey Smith,* compelled the defendant to face clear about in the court room; compelled her to *confess,* as she actually *did then* and *there confess* that down to the night before Smith died, when he drank a toast in their honor, he spoke very freely and lovingly of both the boys, and *"was very fond of them and very proud of them too."*

A valid defense out of such turpitude? This case is

a *confession.* It is more than a *default.* Suppose we had not possessed this letter to stem the reeking tide of maternal corruption. Atrocious denial, documentary impeachment, and abject confession. Such is the defense. Such the answers to these four witnesses. We shall see by and by that defendant has actually eight more witnesses yet to answer. For the present she stands slandering the family love, honor and constancy of the man she had sworn to love, honor and obey, and all this for the one sinister end and aim of clutching to herself, from his defenseless family, the last shining penny of the dead man's estate.

Can she gather grapes from these thorns? Falsehood? Meanness? Impudence? Did the like of it ever parade before the eyes of a court of justice? It is enough to make the blood boil wherever red blood flows in human veins. This defendant *ought* to lose the uttermost farthing.

We do not need a contemporaneous letter that shall compel her to say in so many words, she will burn her whole house. There is her foundation, shattered by her own hand; gone like the House of Usher.

Smith talking and writing to *others,* but never a word to his *wife* in *four years, pro or con.* There *needs* no letter from the grave to refute *that.* There *needs* no *letter* to show beyond *all doubt* that these witnesses tell the truth, and that this defendant's unstable denials are *false.* Her case is in the *quicksand,* not in the solid *truth.*

There is only *this* question:—Which impeaches the

defendant with most violence; the several *witnesses,* or the face of her *story,* or the impeaching *letter,* or the grovelling *retraction,* or the honor and decency which found lodgment in Smith's constitution; or the honor and decency which statutes and equity *presume* found lodgment there, or the interlacing system of Smith's *written* and oral *declarations.* The defense is *broken up and destroyed,* leaving the complainant not only a clear *default* but a clear *verification.*

Four direct *witnesses,* that the defendant confessed and admitted the trust laid upon her by Mr. Smith; two men and two women, *C. A. Brown, Wilbur Hartzell, Mrs. Hartzell* and the *complainant.* On this point the court in the opinion quotes the two women, overlooks the two men and declares the testimony *"upon the whole" insufficient.* The court *overlooks* numerous impeaching *letters,* and numerous impeaching *witnesses; overlooks* the complainant's correlative *support* found in *letters, declarations, witnesses,* and *presumptions,* and declares the complainant's evidence, *"upon the whole," insufficient.* The court says the testimony must be *"irrefragable."* It *is* irrefragable, although this is certainly not the rule of evidence, either in Oregon, where "the preponderance of the evidence," ruled the similar case of Kelley v. Devin, 65 Or. 217-18; 132 Pac. 535, 537; and where as late as Coe v. Coe, 75 Or. 145-158; 145 Pac. 674-678, it was held upon the question of a constructive trust, that the words "free from doubt," do not express the degree of proof required in civil cases; nor in Minnesota, where the language "clearly and satisfactorily established," is employed as the rule by the Supreme

Court in the late case of Robertson v. Corcoran, on this subject, 125 Minn. 118, 121; 145 N. W. 812, 813; to say nothing of the law in Oregon and elsewhere that oral arrangements collateral to a will and constituting good family settlements are "favored in equity." (Kelley v. Devin, page 218, supra, and other cases cited below.)

Especially is this so when the courts remark, as courts frequently *do* remark, that there is *no other child*, or *no child of the blood,* none but the one of virtual, substantial, practical adoption. (Cases cited below.)

Some fiduciary delinquency is here *beyond all doubt.* Something was committed to the defendant in sacred trust, which she now ignominously denies and withholds. *The next question is how much?* On that the defendant makes *wicked default.* She will *not tell.* By no standard of law or decency can she be heard to murmur when *those tell who will. The utmost good faith is required of her. A deliberate confuser of goods* must prove or lose his own share; emphatically so when that confuser is a treacherous fiduciary.

If this well-provided defendant, from mere excess of greed, has plucked one apple from the sacred tree of these destitute people, then as there is a God in heaven and a court of equity upon earth, by the sweat of her brow for the rest of her life she ought to earn her bread. She comes off TOO WELL *in point of law* and *mildness if she saves the one-third conceded to her by the complainant.*

The *defendant* it is who, in this situation, must *prove* the *basis of division.* She it is who has done all the mis-

chief, and caused all the misery. She it is who is put to this proof. (Cases cited below.) If this faithless trustee perversely refuses to disclose her own true portion, it is far better that *she* should lose her share than that *those whom she cheats* should lose *theirs*. That is *self-evident*. These facts are *sure* and these laws are *elementary*. This case is *clear*. This case is *phenomenal*. But in the victory of this stupendous wrong these good laws have suffered *disregard*. The contention that is right in morals should prevail in equity unless some obstruction is *insurmountable*. Injustice and falsehood *combined* are *not* insurmountable. There *is* no obstruction. From New York to California, the courts early and late have dispelled the error of calling any such suit an oral attack upon a will. They hold the will must stand, but the collateral disposition must be enforced. (Estate of O'Hara, 95 N. Y. 403, 413-14; 47 Am. R. 53; Curdy v. Berton, 79 Cal. 421, 426; 21 Pac. 858, 859; and other cases cited in brief below.)

The will is not the issue, and it is not insurmountable. The will stands aside as a spectator, while oral arrangements for family protection stand in equitable *favor*. (65 Or. 211, supra.) Child robbery is merciless, and truth is merciless when it overtakes that infamy. The *way has been opened* here for *equity* to do *justice*. The way of all such transgressors *should* be *hard;* such transgressors who cause great disappointment *even to friends* like C. A. Brown.

Whenever a testamentary disposition is alleged, the shocking injustice of the defense is always a strong, independent factor of evidence for the complaint. It is

not enough alone, but it goes far. Said the Supreme Court of Minnesota by Ch. J. Brown as late as *June 18, 1915*:

> "Without some *explanation* the purpose to ignore his immediate relatives would seem strange and *unaccountable,*" and in that instance the explanation was satisfactorily proved.
>
> Woodville v. Morrill, 130 Minn. 92, 97; 153 N. W. 131, 132.

But there the relatives were only *collateral.* We shall invoke a presumption more specific. Explanation of the unaccountable, is surely demanded of this defendant, and explanation is by her expressly *disclaimed*:

"No, I cannot account for it," says the defendant. "It was as much a surprise to me as it was to anyone." (Rec. p. 460.)

But when great wrongs seek perpetual shelter in equity, *surprises* will not *stand* in lieu of *proof.* And as this lady now of the name of *Wallace* brandishes the *sharp edged knife of poverty* over the *family* whom Mr. Smith in his lifetime always *did* protect, let her look well to it that her legal scale do not vary *in the estimation of a hair. Smith protected* his family while he lived, and he *said* he had protected their future. When directly questioned the defendant is *wise* to forego explanation. She knows there *is* no explanation, that will not explode by the prick of a pin, and *it is fruitless for the court to attempt explanation* (Rec. p. 113) where the *defendant* has *none* she *dare assign.*

Smith insured his wife over and above the estate

(Rec. pp. 179-80) and like too many others in the books, he *thought* he had insured his family. (Cases cited below.) The destitution of this family is the act of one impelled by *greed;* not the act of one who had no motive but *love.* Doubt this, however, if you can. Doubt if you can that Smith ever in *all the years* made a *promise,* an *instruction* or a *suggestion* in relation to his own. Say, *if you can,* that this doubt is *reasonable.* It profits the defendant nothing. On the defendant's own admissions from the witness stand, first that the complainant was Smith's *daughter,* and consequently next that the will is *hopelessly astonishing,* the case then calls *loudly* for the application of the following law laid down in Missouri, supported on principle in Minnesota, and questioned no where yet in courts of equity:

> ". . . *since she was forgotten in her adoptive father's will, she must be accorded the rights given by law to a pretermitted heir."*
>
> Thomas v. Maloney, 142 Mo. App. 193, 198; 126 S. W. 522, 524.

We cite the following statutes for the benefit of pretermitted heirs:

> Minnesota Revised Laws 1905, Secs. 3669, 3653, 3648, giving the child two-thirds.
>
> General Statutes of Minnesota, 1913, Secs. 7260, 7243 and 7238.
>
> Bellinger and Cotton's Annotated Codes and Statutes of Oregon, Sec. 5554.
>
> Lord's Oregon Laws, Sec. 7325.

Still broader in effect is the following from the Supreme Court of Minnesota in 1913:

> "Neither can it be said . . . that because a court *cannot* decree the *status* of *adoption,* it may not adjudge *property rights equitably equivalent* to those *legally incident* thereto."
>
> Fiske v. Lawton, 124 Minn. 85, 92; 144 N. W. 455, 458.

Such is the law of the land on which these transactions occurred. In the Missouri case there was an ancient oral agreement to adopt, but no statutory adoption, and no contract or provision as to property whatsoever. It was an admitted case of parental neglect, yet the child won her share.

'If the will was not evidence against a *presumption* of *oversight* there, it is not evidence against *proof* of a *contract* or *provision* here. All the *body* and *substance* of *that decision* is found in the *case at bar.* For both cases rest on the *same foundation of adamant.*

A will which fails to name an only child of fourteen years' virtual, substantial adoption; which fails to present even the significant one dollar, is not better evidence here than elsewhere that the parent has transformed himself into a beast; thrown family to the wind; thrown education to the wind; thrown promises to the wind, and thrown the eternity that faced him to the wind. The mere will is not evidence of it.

By analogy to the humane presumption of law, there is a general presumption in equity always, and a special presumption on the facts at bar, of parental solicitude

and honesty; a presumption that *nothing but evidence will rebut.* And when the defendant dismisses this matter as a *riddle,* she leaves that presumption *standing intact. This mighty wrong must fail, therefore,* on the *defendant's own elucidation.* Equity is no more eager than the law to sit with hands tied while it signs the death warrant of right and justice. Such a *will* is *not evidence* that Smith first appropriated and then shamelessly offended against these little ones. The material is right here, that long ago founded decrees human and divine.

We defy counsel to show where a court of equity has ever yet declared this Missouri case bad law. The enlightened and natural position there taken is merely abreast of the statutes. It is a position when once taken in equity, from which equity can thereafter scarcely recede.

All legal roads lead to justice. Justice is their origin and master. Legal roads are not mere conductors to the shades of obliquity. They lead to the plain truth. The destitution of this family is the act of her who evermore withholds, not of him who evermore provided.

If respected, these laws are of course conclusive of the case at bar. Why should these several laws be laid away? What unsoundness is there in them? What evil have they done? Why should equity shrink from their execution? Why will equity abjure the instruments of its profession? These laws and these courts are all that stand between the people and a never-ending succession of corruption and swindle.

Yes, all the substance of the Missouri decision, all the substance of the Minnesota decision is here, and these cases are in harmony with the large body of American law on this subject.

The case of Daniels vs. Wagner, 237 U. S. 547, differs from the case at bar in its facts, but not in its equitable substance. Maladministration was clear, and nothing urged by the delinquent fiduciary, was allowed to obstruct his condemnation, as a trustee ex maleficio.

According to the *defendant's witness,* Mrs. Lauderdale, the complainant's conduct toward Mr. Smith, "was just as nice as his was toward her," (Rec., f. 549) and his conduct toward her, "was just like that which you would naturally expect of an own father." (Rec., p. 548) That then is the *confessed* relation of Mr. Smith and Bess in 1901. They were companions in a double sorrow. It was before the era of the defendant. Smith's family affection was undivided. The complainant and the babies were his home. That home was sweet according to the time-honored servant in Smith's house, Emily Carlson. And Smith himself in one of his letters to the complainant praises Emily Carlson. (Rec. p. 597) What the complainant says Mr. Smith then promised we know he must have then intended. He could not change his mind for a new attraction, if his blood ever became sufficiently cold. He could not put two babes out at sea, take care of them for a while, and abandon them to their fate for the lure of a childless wife. If his soul died, his contract survived. But come down to his last days. Here were two females. They were the only two. Smith supported them both. He loved

them both and he remembered them both. Smith never did take this complainant as a poor girl, without choice of hers, lead her up the delectable heights of luxury, and then without warning and unaccountably, dash her to the cold ground, at the moment and coincidence of his death, when he knew that money would be of no more use to him and when he knew he could no longer answer a cry of distress.

It can be said of this complainant's agreement, as it was said of the similar oral agreement in the Supreme Court of Oregon in 1913:

> "It was a natural agreement, in the nature of a family settlement, and it should be carried out by the courts if possible, because such agreements are *favored in equity.*" Kelley v. Devin, 65 Oregon, 211 supra.

The defendant swears she permitted Smith to act naturally. She is bound by that oath. This disinheritance is the natural child of greed, not the unaccountable miscarriage of love. The legal presumption of Smith's parental care is signally vindicated by the evidence. Presumption and witnesses concur. Mercy and truth are met together. These twin peaks of the case are conspicuous enough, but above and beyond all, standing between and supported by them is the summit: When the complainant gives the only version of the disposal and division of this estate that is consistent with Smith's manhood, fidelity or honor, and the defendant with full knowledge of the facts, gives a version which we know is replete with falsehood and injustice, when she meets

the issue by nothing better than conjugal smirch, and enforced retraction, then if this sublime mixture of evil is entitled to an award of equitable triumph, it is impossible to repress the inquiry when will high courts of conscience expel the intrusions of infamy.

Holding that the testimony must be irrefragable, the court suggested certain doubts. We have seen that this degree of proof is error, in civil cases, and now let us look at the doubts.

(1) The court remarks that the complainant did not present her claim in Probate Court. The error of this is *severe*. She acted both on *Minnesota authority* and the advice of *counsel*. The authorities then existing and cited below are *unanimous* that *Probate Courts* have *no jurisdiction* of these *constructive trusts*, and if comformable to the pleasure of the court, on trial de novo, we crave leave *to present and prove* a *letter* of the complainant's *counsel, Henry E. Barnes, Jr., dated September 23, 1907*, a month after Smith died, in which upon an examination of the authorities, she was *in effect so advised*. The authorities examined no doubt included Laird v. Vila, 93 Minn. 45, 100 N. W. 656, decided three years before that time.

(2) The complainant finally accepted Smith's offer late in the Spring of 1901, but the divorce was not filed until September. The complainant was pregnant at the time with her second child Robert, born in July. The divorce was begun soon after convalesence. The court quotes at length from the complainant's testimony and comments on the delay, but overlooks her brief re-

mark that she was pregnant. These errors are prejudicial. We defy counsel to point out where the complainant has erred in a whole day's examination on any material matter.

(3) The complainant showed in court that Smith early desired her legal adoption. This was in keeping with his whole attiude. The complainant admitted on the stand that she once answered Jessie Carey Smith that her mother thought best to forego a legal adoption because her divorced father had the prospect of a gold mine in Alaska. That episode occurred about seven years before Smith died; long before he designated the complainant as his daughter and trustee in his solemn will, and long before a myriad of parental offices to the end of his days. It was no check whatever on the parental activity of the man whose parental and disposing mind we are considering.

The girl who would not deny that two-party conversation on the witness stand, was beloved by Smith as a daughter. The defendant says he considered her an attractive person. That attraction was grounded upon such traits as love of children and adherence to truth. There was a mental part in this Mr. Smith. We read it in all the witnesses and all the letters. It was severely bartered at Fargo, North Dakota, in the year 1902, but the tendency of good constitutions is toward recovery. Instead of presuming man's infirmity, if we read the witnesses and letters in every line, it becomes impossible to believe that Smith on any consideration ever bartered his soul.

But if we are to insist upon his total depravity; if

murky atmosphere is to surround his tomb, his family promise made before the day of his obsession is unimpaired. The real mother before King Solomon won her famous case on that well nigh infallible presumption, of all codes and all generations that one who really does stand in the parental relation will have the honor and innocence not to abandon the child to a cruel fate. The same presumption is sufficient here without an army of supporting witnesses and documents. And the same presumption is the actual secret of the child's success in the great body of American decisions upon this subject, will or no will, contract or no contract, wherever the substance of the parental relation is found.

But the court inadvertently removes that remark of the complainant about the *gold mine some seven years from its setting,* and quotes it where it might easily be mistaken for *a* LAMENT of the complainant, *"after the estate was probated."* This displacement may have been prejudicial. (Rec. pp. 112, 390, 391, 333.)

(4) Referring to Smith's alleged parental agreement, followed by the wedding day will, the court says: "Considering Smith's sense of honor and his faithfulness in observing his obligations, it seems hardly probable that he would have made such a will in disregard of such an agreement." The argument is self-destructive.

The complainant's whole version of this case is a thousand times less reproach to Smith's honor, than the defendant's whole version and the court's whole version,—especially in view of his conceded interference which led to the divorce and the orphanage.

Hardly probable. Standing on a pinnacle alone, the fact would be hardly probable; but standing underneath its related facts, it is hardly dispensible. What else can explain the defendant's absolute impeachment by her mother, when she vainly attempted to hide all knowledge of that fugitive will? What else can explain the execution of this will before a strange attorney in a strange land? What else can explain the defendant's pretense that without her knowledge Smith went to an attorney and made the will between the wedding vows and the departure of the train? It was a clear case of no will, no I will. Fine modulation and quiet insistence could dampen a wedding better than any Rime of An Ancient Mariner. What else can explain the lady's protest that she does not know when she even looked at the copy thereof, carefully furnished her by Mr. Smith for preservation, before she stirred out of her Fargo. The defendant is most innocently impeached by her mother. She is not false in one of these things. She is false in all of these things.

All along her route is the trail of the defendant's impeachment. She is mercilessly impeached by the letter of Mr. Smith which flatly refutes her wicked oath of Smith's casual family acquaintance. She is mercilessly impeached by the letter of her witness Jessie Carey Smith, flatly refuting the defendant's slander of her husband's family honor; by the letter of her own witness C. A. Brown, showing her former admission how Smith in this business trusted and relied upon her; by the sworn statement of her own mother which flatly refutes her pretended innocence of the Fargo will; by the deposition of

her witness Mrs. Wright, which discredits her alleged copy of Smith's letter; by the depositions of her witnesses Mrs. Lauderdale, Mr. Landerdale and Emily Carlson, when she says Smith never uttered a care of his family in his last four years; seven witnesses of her own and the decedent actually veer to the complainant's side. She is impeached by the testimony of Mr. Hartzell and Mrs. Hartzell, which prove the same confessions of trust as the letter of C. A. Brown; by the testimony of W. T. Price, Sr., who recites Smith's account, after his last will, of the provision already made for Bess and the boys; and by the testimony of the boy Donald, who recites his own early recollection of Smith's love. Twelve witnesses, besides the complainant, and this is not a catalogue. These are samples. No mere error of date or circumstance. All fiendish, blazing, malignant.

If this defendant had a true defense she would never in the world waste *all* her time on a false one.

(5) In view of the defendant's own virtual acknowledgment of the complainant as a daughter and trustee of Mr. Smith to the end of his life, and in view of the fact that babies cannot be particeps criminis in desperate financial efforts of the mother in behalf of the unhappy father, all the defendant's contradictory account earlier in the trial of trouble between Smith and the complainant in money matters, beginning when the defendant began and ending four or five years before Smith died, and attributed by Smith to the complainant's husband according to Mr. Lauderdale, all this is unseemly and irrelevant gratuity.

We have seen that the defendant's three witnesses,

Mr. and Mrs. Lauderdale and Emily Carlson, in their deposition on cross examination freely declare the unruffled steadiness, the full substance and the mutual character of this parental and filial relation *at least down to the day of the defendant, at least until after this family contract was made.* The testimony of these three witnesses of her own will no more mix with the testimony of the defendant as a whole, than oil with water.

The court relies for the relations of these parties down to *1907*, not upon this general testimony of even the defendant's witnesses, but upon two alleged expressions of *1902* or *1903*, one on the word of this defendant, and the other on the memory of Mr. and Mrs. Lauderdale. This latter is a truly Herodian outburst said by these *same* defensive witnesses to have been made by Smith, at the defendant's tea table, and the defendant's elbow, one Sunday evening in the complainant's absence, in *1902 or 1903*. It was to the effect that he was absolutely going to do no more for Bess and the babies. He was going to renounce his family. *He was going to "absolutely stop." But in the next five years he never stopped.* Parents have been known to *recover* in *five years* from an outburst of anger, *fomented* or *unfomented*. Are we to suppose the strength of the tea overwhelmed all that could subsequently happen forever?

The other quotation is a copy that the defendant claims to have made in her own hand, under suspicious circumstances, of a letter of Peter B. Smith. The part quoted by the court criticizes the complainant in money matters. It is contrary to the best recollection of the defendant's witness Mrs. Wright, who saw the original let-

ter, and it is so different from Smith's letters in the ensuing years, which all admit are authentic, that its validity is severely shaken, and in all events its import is entirely superseded and obliterated. The court calls it Smith's letter. The parental relation is indeed the secret of the case, and if that relation is to turn on *Smith's letters,* let us look to the letters that we *know are* Smith's, not to the *defendant's ink,* which differs from *all* of Smith's ink as the dead of midnight from the noonday sun.

If we wish to discover Smith's relation in *1907,* let us take what *he wrote in 1907,* not what the *defendant* wrote in *1903.* This case seems too plain for argument. *Not an unkind word were they able to find on earth concerning the complainant over the signature of Peter B. Smith.* Out of the heart are the issues of this case, and there is certainly a heart in Smith's fatherly letters that is not in this judicial opinion.

(6) The remark of the court that after a certain date, Smith's allowances to his family ceased, is also very unfortunate, in view of the fact that all Smith's letters down to the last one to be found, a few months before his death, show that his kindly, fitting and ample remittances *never* ceased, and better still that his triple remittances of *parental thought, never, never ceased.*

The court must fail just as completely as we have seen the defendant fail, in any attempt to impeach the constancy of Smith's parental manhood.

(7) One witness adheres to the defendant, Jessie Carey Smith. She is the lady who traveled to Portland from Minneapolis to show the court that she knew what

Smith thought better than Smith himself. *Smith* may call the complainant his *daughter* to his heart's *content,* and *write* her as such unto the *end.* The *defendant* may *concede,* if she *must* concede, Smith's constancy unto *death* in that regard. But after evading the question as long as she *could,* Jessie Carey Smith declared to the court on her oath that the complainant was *only a friend.* (Rec. pp. 367-68.)

At 1 P. M., August 16th, in New Hampshire, Mr. Smith died (Rec. p. 600). Confessedly *some* way was found to get the news into the *pine woods* of *northern Minnesota that same afternoon* (Rec. pp. 398, 394-395), but no message could penetrate the wilderness of San Francisco Bay for a space of five days from the co-incidence of Smith's *death* to the co-incidence of his *funeral.* San Francisco shineth in darkness and the darkness comprehended it not. *Defendant hated the very thought* of this claimant-daughter. Telegraph strike! Jessie Carey Smith insolently tells the court concerning the complainant's telegram:

> "*I* was *notifying the friends* in Dewey's name so I suppose,—I think I sent it." (Rec. p. 372.)

Asked whether the telegraph strike made any delay she still more insolently answers:

> *"Well, I don't know that it did. Did I say that yesterday? I don't remember."* (Rec. p. 373.)
>
> *"I don't know anything about it."* (Rec. p. 374.)
>
> (Rec. p. 375.) "You have taken a good deal

of interest in this case, haven't you? A. Yes, I am interested in it; *know all about it.*

The price of a soul.

A few minutes later Jessie Carey Smith is caught saying that on one occasion she asked the complainant *whether Mr. Smith had ever adopted her.* She thinks Smith adopted all his *friends* as his *children.*

The defendant sees this will not do. She *follows* Mrs. Smith on the witness stand and says a *telegraph strike caused* the delay. *Mrs. Smith* had at *first* taken refuge behind the *telegraph strike,* but abandoned that position. (Rec. pp. 370-74.) THEREUPON A LONG LETTER WRITTEN JUST AFTER THE FUNERAL BY JESSIE CAREY SMITH to the complainant on behalf of the defendant, and *affecting great kindness and consideration,* shows NEVER A MENTION of the TELEGRAPH STRIKE. (Rec. p. 599.) Any one would have hastened to explain the painful delay if the cause had not been disgraceful. No strike in that letter but the strike of the fiduciary. *Yet out of all this confusion the court says: "I think the explanation of the delay is very clear."* (Rec. p. 450.) That letter went several thousand miles out of the way of all humanity, despite all its protestations, to inform the young woman just at that time that her relation to her dead father was that of a *"dear friend."*

The complainant did not think of it that way. She went to Minneapolis at once; she and her husband; not to *learn* whether she had rights, but because she *knew*

she had rights. Any one in Minneapolis could have told her whether she was a legatee in the will. She and her husband very well knew that. She did not travel to Minneapolis from California for mere love of the defendant, but soon after she reached Minneapolis she told Jessie Carey Smith, according to Jessie Carey Smith, that she did not expect P. B. to leave her anything, but thought he might have remembered the children. On the other hand, this neglect of the complainant, so fully expected by the complainant, is to this day a dark, unsolvable mystery to the defendant!

Crime waited until this case for its masterpiece. This case is a horror. It is the very refinement and quintessence of evil.

When the complainant gives the only version of the disposal and division of this estate, consistent with Smith's manhood, fidelity, or honor, and the defendant with full knowledge of the facts, meets the issue with a demoniac mixture of slanders, confessions, contradictions, cruelties, and perjuries, then, indeed, if her defense prevails, it becomes impossible to repress the inquiry, when will "hell-broth" stir the revolt of equity.

AUTHORITIES.

I.

Flexible and penetrating are the legal theories, but they all converge on the one object of bruising the serpentine head of fraud.

Pathetic as the facts in this case are, they assume a deeper color in the light of kindred citations. In no

other branch of judicial literature is the humane feature more eloquent and controlling. Unless some innocent party is damaged, the child in such cases seldom fails to receive, the usual child's share. No one can read the decisions without seeing that they are grounded, four square, upon the plain distinction of right and wrong. As to the legal terms employed, their name is legion, but the whole creation of God has neither nook nor corner where the perpetrator can bestow his fraud and say, it is safe.

I suspect no one would say the total absorption for which the defendant contends is *right.* And so exhaustive are the equity decisions, that on the admitted facts, and the settled law, there is no *room* for success in this case at bar, of the side that prays for a *wrong.*

One illustration will suffice: After he once willed the family $10,000.00 and again wrote that he would provide suitably for education, and took the custody of the babes from their father, and told the defendant's mother he had provided well for his daughter, and fully *sustains* this same parental frame of mind, in his unbroken line of remittances, visits, and letters, to the very last, *then,* to say nothing of his extended oral commitments, but *building entirely* upon the *documents* and the *defensive admissions,* there is no admissable *reason* to *withhold* the rule of evidence, that the defendant is at least called upon to *offset* these facts, by something *said* by Mr. Smith *later,* to the *contrary,* instead of falling back as she does on the proposition, that in four years, he said never a word *pro* or *con.*

What is the nature of the legal remedy for this wrong? By what sign and token is it discernible in the decisions? Is it chiefly by the stipulation of a moment, or the course and destiny of a life? The right of the child which is protected and enforced in such cases is by no means a mere contract right. It is rather the right to redress against fraud. The measure of recovery, if there be no other measure, is found in the *statutory,* "child's share," of the estate.

The parol evidence is "*auxiliary* to the proof afforded by the *circumstances of the case itself.*"

Waterman's Spec. Perf. 261.

Harrison v. Harrison, 80 Neb. 103-110; 113 N. W. 1042.

Where the testator orally declares that a certain devise is in trust, and that he must leave it entirely to the devisee's honor, and the devisee afterward makes similar admissions, declaring that it was a trust for young William Hoge, such declarations of the testator:

> "have always been not only competent but powerful evidence of the fact declared,"

and equity holds the devisee in such cases as a trustee ex-maleficio in order to "get at him."

Gibson, Ch. J. in Hoge v. Hoge, 1 Watts, 163, p. 214.

"—the declarations of the deceased" husband and "*her* admissions from time to time" prevailed over the face of a deed.

"The law declares her to be a trustee ex-maleficio for the purpose of working out equity."

Wolverton, J., in Parrish v. Parrish, 33 Ore. 486, 504-5.

When a rich man takes a poor child as his own, under an agreement with his father, a "right" is thereby vested in the *child* which is:

"derived *not* from the *contract* itself, but from what has been *done* under it, and the WRONG he would otherwise sustain."

Waterman Spec. Perf., Sec. 54.

Crawford v. Wilson, 139 Ga. 654, 78 S. E. 30, 44 L. R. A. (N. S.) 773.

"It is impossible to estimate by any pecuniary standard the value to the parties taking a child."

Chehek v. Battles, 133 Ia. 107; 8 L. R. A. (N. S.) 1130; 12 Am. Cas. 140; 110 N. W. 33.

"The contract was a parol one, it is true, but it was fully performed on the part of the plaintiff when she was transferred into the family of Mr. Healy and assumed towards him and his wife the relation of daughter."

Healy v. Healy, 55 App. Div. 315, affirmed 166 N. Y. 624.

"The influences of a child of tender years in the home circle are too sacred and holy to be estimated in dollars and cents."

Burns v. Smith, 21 Mont. 251-270.

An oral contract that a son, of virtual adoption, should have all the property of the father at his death, was followed in the course of time by a second marriage of the father; and the second marriage was followed by a *deed* of all his property to relatives of the new wife. The contract had to do with the property remaining at *death*, but the father was still *alive;* had to do with *all* his property, and here was a second *wife*.

The court, declaring it had "not been deterred from casting about to find some relief," set aside the sale as *fraud,* and decreed that the property be held for the son, *subject,* however, to dower, and suitable provisions as to use and improvement. Thus the son of virtual adoption received what *would* be a child's share under the laws of succession. It was by no means the mere question of enforcing or rejecting a contract. It was a just division on just principles.

Van Dyne v. Vreeland, 11 N. J. Eq. 370 and 12 N. J. Eq. 142, 158 (1858).

"As I read those authorities, they are not based solely upon the existence of a *promise.* This is a case where, in my judgment, equity should decree that to be done which the parties clearly intended."

Grant, J., in Wright v. Wright, 99 Mich. 170; 23 L. R. A. 196, referring to Van Dyne v. Vreeland, supra, and Van Tine v. Van Tine, 1 L. R. A. 155, a later New Jersey case.

Van Dyne v. Vreeland is cited and approved in nearly every case, since 1855, upon this subject. Cyc.

calls it the leading case. The decisions are many. I can cite and review but a few.

A very late case, much akin, which follows Van Dyne v. Vreeland, is *Rogers v. Schlotterbach,* 167 Cal. 35, 138 Pac. 728 (1914).

In the case last named an oral contract was made in *1851*, that a son of virtual adoption, but not of legal adoption, should share alike with the father's own daughter. Manifestly the father could by a will disinherit his own daughter, and partly by deed, partly by will, he attempted to disinherit this *son,* and again the court, although declaring the case was "not entirely free from doubt," gave the son and the own daughter each one-half of the property *deeded* and the property *willed.* The court held that, 'The contract was substantially that he should have what *would be a child's share under the laws of succession.*" Pages 44 and 47.

In the same case Mrs. Roger's anxiety for the future welfare of the son was great, and she had caused Mr. Rogers to make a will in 1881, giving him one-half. On page 44 the court says:

> "Her anxiety in this respect falls *but little short* of the recognition of an *obligation* on her part."

In the *Van Dyne* case, at page 149 of 12 N. J. Eq. the court says:

> "He made several wills, and by the disposition of his property *recognized the agreement,*" although his *latest* will gave the son *nothing.*
>
> "But there are other considerations tending strongly to establish appellant's hypothesis (that

of a contract). Every act of all persons concerned in changing the custody of this child from her natural parents to the Herricks, their subsequent conduct towards her and her relatives, her change of name, their practical adoption of her, and *recognition of contractual obligations in their respective wills,* all these must be considered, and are not only consistent with appellant's theory, but are *inconsistent with any other."*

Fiske v. Lawton, 124 Minn. 85-88.

Hence the child in that case received the equivalent of the statutory child's share. Such is the spirit of the law in the state whence the complainant has pursued the defendant, and such is the spirit of the law of Oregon as shown in Kelly v. Devin, 65 Ore. 211, supra.

Carmichael v. Carmichael, 72 Mich. 78, 16 Am. St. Rep. 528, 40 N. W. 173 predicates a contract upon the circumstance of the two wills of a father and mother. The report may be searched in vain for any direct proof of a contract.

Bolman v. Overall, 80 Ala. 451, 2 Sou. Rep. 624. This is one of the cases that is strong on the probative importance of a will in such cases.

On page 150, 12 N. J. Eq. in the Van Dyne case, the Chancellor says, very significantly:

> "And I may add that while she (the first wife) lived, defendant *never repudiated* his legal obligation."

In that case the grantee claimed he had no knowl-

edge of the agreement, but on page 152 the Chancellor says he had knowledge of facts from which some agreement, *"could be inferred."*

In *Paul v. Snyder*, 52 Ind. App. 291, 100 N. E. 571 (1913), it was held a contract for a will might be inferred without *any* proof of oral negotiations, from the fact of a will and the surrounding circumstances.

In *Smith v. Cameron*, 92 Kan. 652 (1914), there was *no direct* proof of the oral contract which was found to have been made fifty years before.

The same principles are worked out in the New York cases. A contract that a child should share the same as if the promisor's own son, encountered the plausible argument that a man can disinherit his own son. But after an interesting discussion the court found this logical symmetry less important than the substance of intent and justice. The court concludes:

> "Under the contract Gates should by testamentary devise have given him the whole."
>
> *Gates v. Gates*, 34 App. Div. 608; 54 N. Y. S. 454.
>
> Approved in *Winne v. Winne*, 163 N. Y. 262.

Other New York cases are similar. Circumstances vary, in cases of this character. We see the waves of fraud in these cases surge how they may, and we see the visitations of equity, as they "take the ruffian billows by the top."

> "In the very nature of things nine years in the life of a child so changes conditions that it is out

of the power of any earthly tribunal to restore the parties to their original situation and environment, and the courts therefore compel them to stand upon and abide by the record they have made."

"Rather than allow such a gross piece of dishonesty to go unredressed the court would struggle with any amount of difficulties, in order to perform the agreement."

Oles v. Wilson, 57 Colo. 246, 262-3, 271-2 (1914), 141 Pac. 496.

"It is argued that her relatives were poor and that she had, in the family of Mr. Lynn a better home and more refined rearing than she would have had if he had not taken her. That may be; but it does not follow as a legal conclusion that the reward was all on her side or even that it was her gain at all. That she took the place of an only daughter in the lives of Mr. and Mrs. Lynn, and performed her part as such, is the cold fact which the law regards as a sufficient consideration to support the contract. How much she added to their happiness the law does not undertake to estimate. What her life would have been, if it had been left to flow in the channel that nature had given her, whether happier and better or the contrary, no one can tell * * *."

Lynn v. Hockaday, 162 Mo. 111-126; 61 S. W. 885.

The Supreme Court of Minnesota in Fiske v. Lawton, supra, relies very much upon Lynn v. Hockaday.

The gentle pastime of killing off a husband and father is a circumstance more enlivening than any of these cases contain, and upon causes less acute we find the principles of equitable estoppel, under whatever name, conspicuous in the decrees of equity.

> *Dimond v. Manheim,* 61 Minn. 178, 181; 63 N. W. 495. Mitchell, J. "Equitable estoppel in the modern sense arises from the 'conduct' of a party." "Its *foundation* is *justice* and good *conscience.*"

Can any question remain about the *foundation* of this case at bar?

> Woodcock's Appeal, 103 Me. 214, 68 Atl. 821; 125 Am. St. 291 (1907), holds that adoption imposes an obligation in morals, and thereupon the court *found* an obligation in law to make provision for the adopted child.

What is this, and what are all these, but splendid illustration that the rule of law can and will follow the rule of morals.

> "* * * it is not material whether the promise be made before or after the service."
>
> *Thompson v. Stevens,* 71 Pa. St. 161-170.
>
> "* * * a past consideration * * * is equally meritorious."
>
> "The services were rendered at her father's *request,* and on that the *law creates* a liability on his part to pay for them; it would be to reverse legal presumptions, to hold that because she failed to

haggle with her father as to the price of wages, she rendered the service as a gratuity." Specific performance decreed.

Warren v. Warren, 105 Ill. 568, approved in *Dalby v. Maxfield,* 244 Ill. 214.

"This is not setting up anything in opposition to the will, but taking care that what has been *undertaken* shall have its *effect* * * * It is very proper that the person who undertook to duly act should *perform,* because I *must* take it, if Mrs. Ann Wilks had not so promised the testator would have altered his will."

"Therefore I am of opinion that such an undertaking by an executor or residuary legatee, before or after the will is made, ought to have its effect."

"The next question is whether this has been sufficiently proved? I think it has very clearly; for even sometime after the will had been made, Mrs. Ann Wilks declared she would not defraud the plaintiff, and there is a full evidence likewise of the undertaking by which she bound her own conscience."

Hardwicke, Lord Chancellor, in Drakeford v. Wilks, 3 Atk. 539.

"* * * all along the line it was steadily answered that the devise was untouched; that it was not at all modified; that the property passed under it, but the law dealt with the *holder,* for his *fraud,* and out of the facts, *raised* a trust ex maleficio, in-

stead of resting upon one as *created by the testator.*"
Curdy v. Berton, 79 Cal. 421-426; 21 Pac. 858; 5 L. R. A. 189; 12 Am. St. Rep. 157.

Judge Cooley speaking for the whole court, held a devisee to the duties of trustee, although there was no communication between him and the testatrix, and so far as appeared, he knew nothing of the will or devise until after the testatrix died. There were no admissions, but there were later circumstances against the devisee. It was considered a close case, but the right prevailed. *Hooker v. Axford,* 33 Mich. 452.

II.

The following are among the many cases where trusts were raised and enforced by construction, under various circumstances, but all against the general class of trustees, of whom John Hoge, Mrs. Ann Wilks, Mrs. Parrish, Livingston Axford, and Mrs. Guy L. Wallace are specimens.

The acceptance of the trust may be active. It may be tacit. "Its foundation is justice and good conscience." It is constructed, * * * "for the purpose of working out equity." It brings the culprit around in front where equity can, "get at him."

Estate of O'Hara, 95 N. Y. 403, 47 Amer. Rep. 53.

Dowd v. Tucker, 41 Conn. 197.

Laird v. Vila, 93 Minn. 45, 100 N. W. 656, 106 Amer. St. 420.

Norris v. Shephard, 20 Pa. St. 475.

Williams v. Vreeland, 32 N. J. Eq., 135 and 734 (Note).

Duvale v. Duvale, 54 N. J. Eq. 581, 90 (1880).

Gilpatrick v. Glidden, 81 Me. 137, 10 Am. St. 245. Many authorities and note.

Towles v. Burton, 24 Am. Dec. 409. Freeman's Extensive note.

Crossman v. Keister, 223 Ill. 69, 97 N. E. 58, 8 L. R. A. (N. S.) 698, note on p. 703.

Shields v. M'Auley, 37 Fed. 302, Dist. of Pa.

Edson v. Bartow, 10 App. Div. 104, 113.

M'Lellan v. M'Lean, 2 Head. 685.

Thymm v. Thymm, 1 Vern. 296.

Harris v. Horwell, Gill's Eq. 11.

2 Harg. 291-4-8.

Chamberlaine v. Chamberlaine, 2 Freeman, 34.

28 Am. & Eng. Enc. of Law, 885 (3).

III.

This record admits no doubt that the defendant is concealing something that Smith intended and directed for his family.

In all such trusts the rule of law is this:

"In a suit for an accounting defendant has the burden of proving *what allowances should be made to him.*"

Thatcher v. Hayes, 54 Mich. 184. Cooley, J.

"It is well settled that, when a *fiduciary relation is shown* to exist, and property or property interests have been *entrusted* to an agent or trustee, *the*

burden is thrown upon such agent intrusted, to render an account, and to *show* that all his trust duties have been fully performed, and the manner in which they have been performed. It is *assumed,* that the agent or trustee, has *means of knowing,* and does know what the principle or cestui que trust *cannot* know, and is bound to *reveal the entire truth.* (Marvin v. Brooks, 94 N. Y. 71.)"

Frethey v. Durant, 24 App. Div. 58-61. 39 Cyc. 476.

"* * * the burden is upon the trustee to make a proper and satisfactory accounting of the funds which came into her hands. If she does not do so, then every intendment is against her, and she should be *charged with all items not properly accounted for.*"

Cherug v. Ames, 138 Ia. 697; 116 N. W. 865-866.

"A gift obtained by any person standing in a confidental relation to the donor is prima facie void, and the burden is thrown upon the donee to establish to the satisfaction of the court, that it was the free, voluntary, unbiased act of the donor."

Jenkins v. Jenkins, 66 Ore. 12; 132 Pac. 542-3.

IV.

Mr. Smith's express agreement in 1900 and 1901, to leave the complainant all his property as modified at the time he engaged to marry the defendant, is confirmed

by his written admission of its practical equivalent, by the divorce obtained through his dictation, by his admissions and the defendant's admissions to third parties, by the fact that he was at all times dealing with one only child and daughter, and by all the ethics and circumstances of the case, and created a trust even *in his own hands,* which followed the assets into the hands of the defendant. Upon this point the following, are among the multitude of authorities.

Johnson v. Hubbell, 10 N. J. Eq. 332, 69 Am. Dec. 773. Freeman's Note.

Teske v. Dittberner, 70 Neb. 544-46 (1903), 98 N. W. 57.

Burdine v. Burdine, 98 Va. 515, 524, (1900).

Oles v. Wilson, 57 Colo. 246, 141 Pac. 489.

Thompson v. Stevens, 71 Pa. St. 161.

Bolman v. Overall, 80 Ala. 451, 2 So. Rep. 624.

Jaffee v. Jacobson, 48 Fed. 21; 14 L. R. A. 352.

Clow v. West, 142 Pac. 226. (Nev. July 1914.)

Schutt v. Miss. Soc. 41 N. J. Eq. 115.

Savings Bank v. Hartshorn, 67 N. H. 156.

Davies v. Cheadle, 31 Wash. 168; 77 Pac. 728.

Quinn v. Quinn, 5 S. D. 328; 49 Am. St. 875.

Lothrop v. Marble, 12 S. D. 511; 81 N. W. 885.

McCollum v. Mackrell, 13 S. D. 262; 83 N. W. 255.

MaCabe v. Healy, 138 Cal. 81; 159 Pac. 82.

Moline v. Carlson, 92 Neb. 419.

Heery v. Reed, 80 Kan. 380; 102 Pac. 846.

Schoonover v. Schoonover, 86 Kan. 487; 121 Pac. 485.

Emery v. Darling, 50 Ohio St. 160; 33 N. E. 715.
Rhodes v. Rhodes, 3 Sandf. Ch. 279.
Wellington v. Althorp, 145 Mass. 69.
Cook v. Ely, 116 N. W. 129—Ia.
Bridgewater v. Hooks, 159 S. W. 1004, Tex. (1913).
Fogle v. St. Michaels Church, 48 S. Car. 86.
Bruce v. Moon, 57 S. Car. 60.
Smith v. Pierce, 65 Vt. 200.
Price v. Price, 111 Ky. 771-79.
Harlan v. Harlan, 102 Ia. 701; 72 N. W. 286.
Martin v. Martin, 250 Mo. 539; 157 S. W. 575.

V.

Such trusts are favored in equity, especially when they constitute fair and proportionate family settlements.

Stearnes v. Hatcher, 121 Tenn. 332, 341 (1908).
Kelly v. Devin, 65 Ore. 211.
Shields v. M'Auley, 37 Fed. 302.
Carmichael v. Carmichael, 72 Mich. 78; 16 Am. St. 528; 40 N. W. 173.
Cominsky v. Cominsky, 21 N. Y. Supp. 611.
Oles v. Wilson, 57 Colo. 246, Supra.

VI.

Declarations of the testator and of the beneficiary which indicate a discrepancy between the intent of the decedent and the face of the will carry conviction in sit-

uations like this at bar. It is, therefore, under-statement to say that such declarations shift the burden of proof to the defendant.

Parrish v. Parrish, 33 Or. 486.
Drakeford v. Wilks, 3 Atk. 539.
Matter of Blair, 16 Daly, 540-549.
Lee v. Dill, 11 Abb. Prac. 214.
Dale v. Dale, 38 N. J. Eq. 274.
40 Cyc. 1154-5.

VII.

Slight and ancient oral evidence is sufficient.

Rogers v. Schlotterbach, 167 Cal. 35, Supra, 63 Years.
Fiske v. Lawton, 124 Minn. 85, Supra, 58 Years.
Smith v. Cameron, 92 Kan. 652 (1914), 50 Years.
Van Dyne v. Vreeland, Supra, 11 N. J. Eq. 370, 33 Years.
Martin v. Martin, 250 Mo. 539; 157 S. W. 575, 20 Years.
Healy v. Healy, 166 N. Y. 624, Supra, 21 Years.
Twiss v. George, 33 Mich. 253, 30 Years.
Stiles v. Breed, 151 Ia. 86, Supra, 42 Years.
Peterson v. Bauer, 83 Neb. 405, 408-9; 119 N. W. 767, 32 Years.

VIII.

The contract may be implied from the intent.

Wright v. Wright, 99 Mich. 170; 23 L. R. A. 196 Supra.
Burns v. Smith, 21 Mont. 251; 53 Pac. 742; 69 Am. St. 653.

IX.

No contract of original binding obligation need be shown.

Godine v. Kidd, 64 Hun. 585.

Winne v. Winne, 163 N. Y. 263, Supra, approves same.

Burns v. Smith, 21 Mont. 251, Supra, approves same.

Anderson v. Blakesly, 155 Ia. 430, approves same.

X.

When a new queen is the cause of mischief.

Parrish v. Parrish, 33 Ore. 486, Supra.

Thomas v. Maloney, 142 Mo. App. 193; 126 S. W. 522.

Van Dyne v. Vreeland, Supra, 12 N. J. Eq. p. 150.

Pfulger v. Pulz, 43 N. J. Eq. 440.

Gary v. James, 4 Desaus Eq. 185.

XI.

The fact that there is no other child claimant, or no claimant of the blood, tends to prove the alleged agreement.

Winne v. Winne, 166 N. Y. 263, Supra.

Kelly v. Devin, 65 Ore. 211, Supra.

Burns v. Smith, 21 Mont. 251, Supra.

Gates v. Gates, 34 App. Div. 608, Supra.

Godine v. Kidd, 64 Hun. 585, Supra.

Anderson v. Anderson, 9 L. R. A. (N. S.) 233 Kan. Supra.

XII.

The assumption of the filial relation, is the service which constitutes the real consideration in such cases, and the value of that consideration no financial scales can measure.

Weeks v. Lund, 69 N. H. 78.

Svanberg v. Fosseen, 75 Minn. 350; 78 N. W. 4.

Laird v. Vila, 93 Minn. 45; 100 N. W. 656, Supra.

Bryson v. McShane, 48 W. Va. 126; 25 S. E. 848; 49 L. R. A. 527.

Fred v. Asbury, 105 Ark. 494; 152 S. W. 155.

Burns v. Smith, 21 Mont. 251 Supra.

Bridgewater v. Hooks, 159 S. W. 1004, Tex. (1913) Supra.

Chehak v. Battles, 133 Ia. 107; 8 L. R. A. (N. S.) 1130.

XIII.

No consideration at all is needed for a contract to make a will unless it works injustice to creditors or others, even as between adults and strangers.

Krell v. Codman, 154 Mass. 454; 14 L. R. A. 860; 28 N. E. 578; 26 Am. St. 260, Holmes, J. Especially is this so in favor of a child, according to the decision in *Haines v. Haines,* 6 Md. 435.

Other cases on sufficiency of consideration are:

Elliott v. North, Trust Co., 178 Ill. App. 439. March, 1913. An investment of $500.00 might there result in a profit of millions.

Brinton v. Van Cott, 8 Utah 480; 33 Pac. 218, three months' service of a girl sixteen, and an estate of $5000.00.

Howe v. Watson, 179 Mass. 30; 60 N. E. 415, 38 hours service, and an estate of $3800.00.

Burns v. Smith, 21 Mont. 251, Supra. Large estate.

Oles v. Wilson, 57 Colo. 246. Very large estate.

Crawford v. Wilson, 139 Ga. 54; 44 L. R. A. (N. S.) 773; 78 S. E. 30, Supra. Large estate.

Lothrop v. Marble, 12 S. D. 571, Supra. One month.

Harlan v. Harlan, 102 Ia. 701, Supra. Few months.

44 L. R. A. (N. S.) p. 734. Note.

"* * * property is of no value to a dead man, etc."

XIV.

The marriage of Mr. Smith and the complainant's mother was a consideration, which it would be according to the following case, a "heinous fraud" to disregard.

Nowack v. Berger, 133 Mo. 24; 34 S. W. 489; 55 Am. St. 663, 69.

XV.

This is not an attack on a will.

Drakeford v. Wilks, 3 Atk. 539, Supra, Hardwicke.

Curdy v. Berton, 79 Cal. 420, Supra.

Towles v. Burton, 24 Am. Dec. 409. Freeman's Note.

Estate of O'Hara, 95 N. Y. 403, Supra.

XVI.

In 1900, Mr. Smith strongly desired the complainant to stay with him, and he would be "likely to offer inducements."

Peterson v. Bauer, 119 N. W. 764; 83 Neb. 405, 408-9.

XVII.

The Probate Court had no jurisdiction of the matter of this suit.

Svanberg v. Fosseen, 75 Minn. 350, Supra.

Laird v. Vila, 93 Minn. 45, Supra.

Rogers v. Schlotterbach, 167 Cal. 35, Supra.

Oles v. Wilson, 57 Colo. 246, Supra.

Burns v. Smith, 21 Mont. 251; 53 Pac. 742, Supra.

Wright v. Wright, 99 Mich. 170; 33 L. R. A. 196, Supra.

Winne v. Winne, 166 N. Y. 263; 59 N. E. 832.

XVIII.

The plea of res judicata must be established beyond question. If there be "any uncertainty" the whole subject matter of the action "will be at large and open to a new contention." Where there are several grounds of demurrer or defense, and it does not certainly appear on what ground the demurrer was sustained, there is

no estoppel. And if there be alleged grounds in *abatement,* and others on the *merits,* it will be presumed that the order was *not* on the merits.

Russell v. Place, 94 U. S. 608; Field, J.

Must be "certain to every intent," p. 210. "* * * if there be any uncertainty," * * "if anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel."

Hoover v. King, 43 Ore. 281. Holds that the general rule is it will be presumed the order was not on the merits on such cases.

Kleinschmidt v. Binzel, 14 Mont. 31, 59. Thorough discussion and citation of authorities, and to same effect.

Bissell v. Spring Valley Township, 124 U. S. 225, p. 232. Recognizes this distinction.

Chrisman v. Harman, 29 Gratt, 494; 26 Am. Rep. 387, 390. The court says: "Six causes of demurrer were specifically assigned." Held no bar. "I am satisfied that justice had been done."

Fahey v. Esterly Machine Co., 44 Am. St. 554, p. 566. 3 N. D. 220, Corliss, J. "The least uncertainty," is "fatal." Excellent note to this case on pp. 563 to 567.

Griffin v. Seymour, 15 Ia. 30. The court says: "It is not to be presumed that the court would pass upon the merits of the case after having determined that the proper parties were not before him."

Packet Co. v. Sickles, 5 Wall. 580, 593.

Estep v. Marsh, 21 Ind. 190.

Penouilk v. Abraham, 43 La. Ann. 214. "Must be established beyond doubt."

Lindley v. Snell, 80 Ia. 109. "If there be any uncertainty," the whole matter is at large.

Lewis v. O. N. & P. Co., 125 N. Y. 348. Peckham, J., holds must show affirmatively upon which of two possible distinct and different facts the judgment proceeded.

Stone v. St. Louis Stamp Co., 155 Mass. 267, 272. General denial in former suit put in issue. Other matters not questioned in this suit. Held no bar.

Lea v. Lea, 99 Mass. 493; 96 Am. Dec. 772, 775. No means of determining upon which of three grounds of defense former verdict rendered, and hence no bar.

Stowell v. Chamberlain, 60 N. Y. 272, p. 277. If the judgment was "by reason of the insufficiency of the complaint—formal defects not touching the merits," there was no bar.

Gerrish v. Brewster, 6 Minn. 53.

The court says: "What the defect in the pleadings was does not specifically appear." Defect in "insufficiency or informality in the statement of the cause of action," not a bar.

XIX.

No final judgment was entered, and without that there can be no estoppel. (Rec. pp. 69, 70, 71, 90.)

Giant Powder Co. v. Ore. & West. Ry. Co., 54 Ore. 325.

Hoover v. King, 43 Ore. 211; 72 Pac. 880.

Clearwater v. Meredith, 1 Wall. 25, 43.

Judgment of nil capiat should be entered when it appears that the complainant had no cause of action on demurrer.

Aurora City v. West, 7 Wall. 82-99.

"* * * A judgment that a declaration is bad, can not be pleaded as a bar to a good declaration for the same cause of action, because such judgment is in no just sense a judgment upon the merits."

Gilman v. Rivers, 10 Pet. 301. Same.

Gerrish v. Pratt, 6 Minn. 53.

Swanson v. Gt. North. Ry. Co., 73 Minn. 105; 75 N. W. 1033, "judgment of dismissal on the merits with costs," was there rendered in sustaining a demurrer.

Carlin v. Brackett, 38 Minn. 307; 37 N. W. 342. Upon sustaining a demurrer judgment was entered "that the plaintiff take nothing by the action."

Oregonian Ry. Co. v. Navigation Co., 27 Fed. 277. Deady, J., holds a decision on demurrer is a bar "if a final judgment is given."

Alley v. Nott, 111 U. S. 472-75. A removal case. "* * * if final judgment is entered on the demurrer it will be a final determination, etc."

XX.

The complaint in the Minnesota case of the complainant did in fact state a cause of action. Counsel have ventured no such attack in the present case. The court will not for the purpose of finding a prior adjudication presume that the order of the court disregards the law.

Laird v. Vila, 93 Minn. 45. Did state cause of action.

Svanberg v. Fosseen, 75 Minn. 350. Did state cause of action.

Linton v. Crosby, 61 Ia. 401.

The court says: "We will not for the purpose of finding a prior adjudication presume that the court made an erroneous ruling, in the absence of all evidence tending to show that it did."

Rodman v. Mich. Cent. Ry. Co., 59 Mich. 395-99; 26 N. W. 651.

The court says: "The changes made in the old declaration in framing the one in suit remedied the defects complained of, if any existed, and the fact that no demurrer was interposed to the one in the present case would indicate that a different view was not very strongly entertained by defendant's counsel."

"How can it be said that the merits of a plaintiff's case have been passed upon when the declaration does not state his case, or any merits, I am not able to comprehend." Cited by Taft, J., in 62 Fed. 697.

McLaughlin v. Kelly, 22 Cal. 212, 223. "When

> there has been a fair trial of such an issue, courts usually give the verdict and judgment a final and conclusive effect, etc."

There is nothing to show whether the demurrer was sustained in Minnesota to the complainant's complaint upon the merits, or on some of the three grounds of demurrer in abatement. If there is any uncertainty at all litigants cannot be denied a trial.

But on the other hand, there is this certainty, namely, that the case of Laird v. Vila, 93 Minn. 45, was decided in the Supreme Court of that state about three years before this demurrer was decided in a lower court. It was held in Laird v. Vila, as it is almost everywhere, that these frauds upon women and children in relations of faith and trust are *not* beyond the reach of jurisprudence.

No one has as yet had the hardihood to say in the present case that the fraud alleged in Laird v. Vila, could be brought to justice, but the fraud alleged against the defendant should in truth, as a matter of law, forever go free. Ignorance of Laird v. Vila is the only ground on which that demurrer could have been sustained on the merits. Judicial ignorance will not be assumed if there is a possible alternative. There is an alternative. *The position of the defense is therefore a reductio ad absardum.* The position of counsel in effect is that a court in Minnesota illegally denied the complainant's right of trial, and illegally perpetuated a child robbery, which for the purpose of that case was in all things admitted.

Defendant is as destitute of conscience as she is of law. Find this defense where you may, its badge is still the same.

The judgment was that the demurrer be sustained, in the Minnesota case. There was no judgment of dismissal, or nil capiat. It was not a final judgment, without which there is no bar.

XXI.

In Lindsley v. Union Silver Min. Co., 115 Fed. 46, there was *no* demurrer upon grounds in abatement, *no* uncertainty, and *no* defect in the judgment. Such is the only case cited by the trial court upon the question of res judicata, and how of the law of the merits?

XXII.

The trial court says:

> "It may be conceded *without inquiring,* but *without deciding,* that such and kindred agreements in parol are legally sufficient to justify their enforcement, but with the qualifications first, that they must be reasonably definite and certain; second that they must be established by clear full and IRREFRAGABLE evidence; and, third, they must have been performed to such an extent and in such a manner that the beneficiary cannot be properly compensated in damages."

There the court *stops,* citing *Robertson v. Corcoran,* 125 Minn. 118, 145 N. W. 812, and earlier Minnesota cases.

Let us *recite* the *law* as laid down in Robertson v. Corcoran. The court says:

> "It is *well settled* that a person may by contract bind himself and his estate to give or will his property to certain designated persons at his death. (Citing cases.)
>
> "It is *likewise well settled* that even if such contracts rest in *parol*, the courts may in proper cases enforce specific performance thereof. (Cases.)
>
> "But to authorize a court to decree the specific performance of an oral contract to give property by will, the contract must *appear reasonable*, and be CLEARLY AND SATISFACTORILY established; and it must also have been performed on behalf of the beneficiary to such an extent and in such a manner that he cannot be compensated properly in damages. If the part performance relied upon, consisted in the rendition of services, the value of which *can reasonably be measured in money*, specific performance will not be enforced, and the promisee must have recourse to other remedies. (Cases cited.)
>
> "*If, however, the part performance consisted* IN ASSUMING A PECULIAR PERSONAL AND DOMESTIC RELATION, AS A MEMBER OF THE FAMILY, of the promisor, and in giving him the society and services incident to such relation, and of a kind and character the value of which is not measureable in money, specific performance may be granted if the contract be satisfactorily proven." Citing Svanberg v. Fosseen, 75

Minn. 350, 78 N. W. R. 4; 43 L. R. A. 427; 74 Am. Stat. 490, where the court says:

> "It is a fair inference that these childless old people regarded these nieces with a love and affection *almost akin* to that of parents for their own children, and, in return, the services and society of these children to them were of great benefit and pleasure. The value of such society and services to their uncle and aunt is *incapable of measurement in money.*" Citing cases.

Such cases as this are, therefore, "* * * incapable of measurement in money," and no error could be more obvious than that of repulsing such just demands as this by use of the term *"irrefragable."*

> "The law applicable to these questions is too well settled to justify any extended discussion."
>
> Haubrick v. Haubrick, 118 Minn. 394-7; 136 N. W. R. 1025, 6.

This decree will not bear the light of the facts and it will not bear the light of the law.

> "* * * it is out of the power of any earthly tribunal to restore the parties to their original situation and environment and the COURTS THEREFORE COMPEL THEM TO STAND UPON AND ABIDE BY THE RECORD THEY HAVE MADE."
>
> *Healy v. Simpson,* 113 Mo. 340-346-7; 20 S. W. 881-83.

Burns v. Smith, 21 Mont. 251, 270-71; 53 Pac. 742-46.

Oles v. Wilson, 57 Colo. 246-262-3; 141 Pac. 489-95.

Who will say that this is not law? Who will say it is law for another case but not for this case; and all to the glory of a wrong more debasing than primogeniture, shockingly unequal, shockingly un-American? Why not exercise every intendment *against* this wrong? Why exercise every intendment *for* this wrong?

Deference toward the courts results from all a lawyer's training and education. I look upon a court of equity as the right arm of God on earth. With that reverent feeling I enter the sanctuaries of justice. And as I appear before this high tribunal, I pray, that when I shall stand in turn before the great and final Judge, the Alpha and Omega of all law and all judgment, I may be found to have so contributed to the administration of justice here, that I may find mercy there.

If the oppression which this family has suffered is to be perpetuated, I strive that it may be on some other oath but mine. I have endeavored, as best I can, in this matter to make full proof of my ministry.

Very respectfuly submitted,

WM. H. HALLAM,
Solicitor for Appellant.